(18,912.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 269.

THE HELENA WATER WORKS COMPANY, APPELLANT,

vs.

THE CITY OF HELENA.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.

	Original.	Print.
Caption	a	1
Transcript from the circuit court of the United States for the district of Montana	1	1
Caption	1	1
Bill of complaint	1	1
Exhibit "A"—Ordinance No. 248, to provide the city of Helena and its inhabitants with a permanent water supply	17	9
"B"—Ordinance No. 467, relating to the procurement of a water system and supply for the city of Helena	33	18
"C"—Ordinance No. 483, amending ordinance No. 482, authorizing the taking of water and water rights of certain creeks for a water supply for the city of Helena	38	20
"D"—Resolution of city council authorizing the mayor and city attorney to purchase certain water rights, privileges and property for a water supply for the city of Helena	40	22

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 1, 1903.

	Original.	Print
Subpœna	44	23
Marshal's return	45	24
Demurrer to bill	46	25
Plea	49	26
Order overruling demurrer and plea	54	29
Answer	55	29
Stipulation to amend bill of complaint	72	38
Amendment to bill of complaint	73	39
Order granting leave to amend bill of complaint	76	41
Amendment to bill of complaint	77	41
Replication	80	43
Stipulation as to agreed statement of facts	81	43
Agreed statement of facts	83	44
Order making certain papers part of agreed statement of facts	94	50
Record from district court of the first judicial district of the State of Montana in and for the county of Lewis and Clarke in the case of The Helena Consolidated Water Co. *vs.* Wm. L. Steele, mayor of the city of Helena, *et al.*	95	50
Notice of appeal	95	50
Order to show cause	98	52
Injunction	100	52
Complaint	102	53
Exhibit A—Ordinance No. 95	109	57
B—Ordinance No. 248	124	64
C—Plans and specifications	140	73
Affidavit of Stephen Carpenter	148	77
Exhibit A—Ordinance No. 248	154	80
B—Proposal of Helena Consolidated Water Co.	170	89
Order for issuance of writ of mandate	172	90
Writ of mandate	174	91
Answer	175	92
Exhibit A—Notice for proposals	183	96
Certificate of incorporation of the Helena Consolidated Water Co.	184	96
Demurrer to answer	188	99
Order sustaining demurrer to answer	189	99
Opinion	190	100
Amended answer	208	109
Motion for writ of mandate	217	114
Order requiring water company to supply water	218	114
Order granting writ of mandate	219	115
Writ of mandate	221	116
Clerk's certificate	222	116
Opinion of supreme court of Montana in case of Helena Consolidated Water Co. *vs.* Steele, mayor, &c., *et al.*	223	117
Clerk's certificate	239	125
Amendment to agreed statement of facts	239	125
Answer in district court as amended by order of court	241	126
Order for final decree	246	129
Final decree	247	129
Order allowing exceptions to decree	248	130
Exceptions to final decree	249	130

	Original.	Print
Bill of exceptions	250	131
Statement	250	131
Judge's certificate	251	131
Assignment of errors	252	132
Petition for appeal	258	135
Allowance of appeal	259	135
Bond on appeal	260	136
Citation and service	263	137
Præcipe for transcript	265	138
Clerk's certificate to transcript	266	139
Order of submission	268	140
Opinion	269	140
Decree	298	158
Petition for appeal	299	159
Allowance of appeal	300	160
Assignment of errors	301	160
Bond on appeal	305	162
Clerk's certificate	310	165
Citation and service	311	166

a United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
vs.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Transcript of Record.

Appeal from the circuit court of the United States for the district of Montana.

1 In the United States Circuit Court, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Caption.

Be it remembered that the complainant filed its bill of complaint herein on the 12th day of April, 1901, which said bill of complaint is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Bill of Complaint.

To the honorable the judges of the circuit court of the United States, ninth circuit, district of Montana:

2 The Helena Water Works Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and a resident and citizen of said State, brings this its bill against The City of Helena, a municipal corporation, organized and existing under and by virtue of the laws of the State of Montana, and a resident and citizen of said State, and for cause of complaint against said defendant, your orator complains and says:

1. That it is now and has been for more than two years last past a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and a resident and citizen of said State.

2. That the defendant, The City of Helena, is now and was at all the times herein mentioned a municipal corporation duly organized and existing under and by virtue of the laws of the Territory and State of Montana, and a resident and citizen of said State.

3. That the matter in dispute in this suit exceeds in value the sum of $2000, exclusive of interest and costs.

4. That your orator is the owner and in possession of real and personal property situate in the city of Helena of the value of several hundred thousand dollars, upon which taxes have been levied, assessed and collected by said city for several years last past, and is a taxpayer in said city.

5. Your orator further shows that heretofore and in the month of January, 1890, the city council of the defendant The City of Helena, duly passed, adopted, and published as by law required ordinance No. 248, entitled, "To provide the city of Helena, and its in-
3 habitants with a permanent water supply," which said ordinance was approved by the mayor of said city on the 15th day of January, 1890. A true copy of said ordinance is hereto attached, marked Exhibit "A," and prayed to be taken and considered as a part hereof the same as though set forth herein *in hæc verba*.

6. That George F. Woolston, whose name appears in said ordinance, was at the time of the passage and approval thereof and at all other times during the years 1889 and 1890 a citizen and resident of the State of New York.

7. That within thirty days after the passage of said ordinance No. 248 the Helena Consolidated Water Company, a corporation, mentioned therein, fully complied with all and singular the provisions and requirements of section 25 of said ordinance, by filing with the clerk of the city of Helena an acceptance in writing for itself, its successors and assigns, of all and singular the terms, conditions, and provisions of said ordinance, a bond in the penal sum of $50,000, with two sufficient sureties, conditioned as required by said section, which was approved by the mayor of said city, and also the relinquishment mentioned in said section, which was accepted by said city.

8. Your orator further shows that said Helena Consolidated Water Company fully complied with all of the terms, conditions, and provisions of said ordinance and the contract therein contained and resulting from the acceptance of said ordinance, on its part to be kept and performed, until on or about the 16th day of March,
4 1897, on which day a receiver was appointed and took possession of all of the property of said company as hereinafter more fully alleged.

9. That in complying with the terms, conditions, and provisions of said ordinance and contract the said Helena Consolidated Water Company expended a large amount of money, aggregating several hundred thousand dollars in acquiring a water supply, and a system through and by which to furnish water to said city and its inhabitants, as by said ordinance required, which said system and supply

was accepted by said defendant as complying with the requirements of said ordinance No. 248.

10. And your orator further shows that heretofore and on or about the 16th day of March, 1897, in a suit then pending in the circuit court of the United States, ninth circuit, district of Montana, in which the said Helena Consolidated Water Company was defendant, an order was made and entered appointing one James H. Mills receiver of all and singular the property, rights, privileges, and franchises of the said Helena Consolidated Water Company, a defendant in said suit, and authorizing the said receiver to take possession and assume the management and control of the water plant and system of said company, through which said company had theretofore been and was then furnishing water to said city of Helena, and its inhabitants, as aforesaid, and continue to furnish water in compliance with the terms and provisions of said ordinance No. 248, and the contract embraced therein, and carry on and conduct the
5 business of said company. That the said James H. Mills duly qualified as such receiver by giving and furnishing a bond in a penal sum fixed by said court, conditioned for the faithful discharge of the duties of his office as such receiver, which bond was duly approved and filed with the clerk of said court, and by taking and subscribing an oath to the effect that he would faithfully discharge the duties of his office as receiver and obey the orders of the court, which said oath was filed with the clerk of said court. That thereupon the said receiver took possession of all and singular the property, rights, privileges, and franchises of the said Helena Consolidated Water Company, assumed the management and control of said water plant and system of said company, and thereafter and until his discharge as hereinafter alleged furnished water to the said city of Helena, and its inhabitants through the said plant and system, and fully complied with each and all of the terms, conditions and provisions of said ordinance No. 248, and the contract therein contained on the part of the said Helena Consolidated Water Company, its successors and assigns, to be kept and performed.

11. That thereafter in said suit so commenced as aforesaid a decree was duly and regularly passed and entered directing and authorizing a sale of all and singular said property of the Helena Consolidated Water Company, including all of the rights, privileges and franchises granted by said ordinance No. 248, and the contracts embraced therein, and then owned and possessed by said water
6 company, and appointing, authorizing and empowering Henry N. Blake, as master commissioner, to make said sale. That the said Henry N. Blake, master commissioner, duly advertised and offered for sale all and singular said property in accordance with said decree, and the same was thereupon and on the 14th day of February, 1898, duly sold to the grantors of your orator, Charles S. Tuckerman, a resident and citizen of the State of Massachusetts, and Benjamin Graham, a resident and citizen of the State of New York, as trustees; that a report of said sale was made to and said sale was

duly confirmed by said court. That the said Charles S. Tuckerman and Benjamin Graham, trustees, made, executed, acknowledged, and delivered to your orator a conveyance of all and singular said property purchased by them as aforesaid, and your orator is now and has been since said conveyance the owner of said water plant, supply and system, and property, including all rights, franchises and privileges granted and conferred by said ordinance No. 248, and the contract contained therein. That thereafter and on the 1st day of April, 1899, pursuant to an order of the said circuit court of the United States, ninth circuit, district of Montana, made and entered in said suit referred to, the said James H. Mills was discharged as receiver, and authorized and directed to transfer and deliver over to your orator said water supply, plant and system, and all rights, privileges and franchises conferred by said ordinance No. 248, and the contract therein contained. The said transfer and delivery was thereupon made, and since said date, to wit, April 1st, 1899,
7 your orator has been the owner and in the full and complete possession and control of said water supply, plant, and system, and of all rights, privileges, and franchises conferred by said ordinance and said contract existing by virtue of the acceptance thereof.

12. And your orator further shows that ever since the first day of April, 1899, it has furnished water to said city and permitted said city to use the hydrants connected with and constituting a part of said water plant and system, and has fully complied with each and all of the terms, provisions and conditions of said ordinance No. 248, and the contract therein contained on the part of the said Helena Consolidated Water Company, its successors and assigns, to be kept and performed.

13. And your orator further shows that it and its predecessors in interest have for more than ten years last past furnished water to the said city and the inhabitants thereof through the said water plant and system owned and controlled by it as aforesaid, and the said defendant, The City of Helena, has accepted and used said water during all of said time. That the water plant and system of your orator is the only water plant and system in the said city of Helena.

14. Your orator further shows that in the month of December, 1899, the city council of the said defendant City of Helena, duly passed and adopted ordinance No. 467, entitled: "An ordinance relating to the procurement of a water system and supply for the city of Helena which shall own and control said water system and supply, and devote the revenues derived therefrom to the pay-
8 ment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6 of article XIII of the constitution of the State of Montana for the purpose of securing such water system and supply," which said ordinance was approved by the mayor of said city on the 4th day of December, 1899. That a

true copy of said ordinance is hereto attached, marked Exhibit "B," and prayed to be taken and considered as a part hereof, the same, as though set forth herein *in hæc verba*.

15. That notice of an election was given and published for the time and in the manner provided in said ordinance, judges of election were appointed by the mayor of said city, and said election was held on the 18th day of January, 1900, as by said ordinance required, and a majority of the voters who voted at said election voted "Yes," and in favor of the proposition of extending the limit of indebtedness of said city to procure a water system and supply, as determined by the city council of said city upon canvassing said votes.

16. Your orator further shows that the assessed value of the taxable property of the city of Helena as determined by the assessment for State and county taxes for the year 1899 was the sum of $12,287,510, and the assessed value of said property as determined by the assessment for State and county taxes for the year 1900 was the sum of $9.864,525.

17. That thereafter and in the month of December, 1900,
9 the said city council of said defendant, The City of Helena, duly passed and adopted ordinance No. 483, entitled: "Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek, and those water rights of Prickly Pear creek, comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose," which said ordinance was approved by the mayor of said city on the third day of December, 1900. A true copy of said ordinance is hereto attached, marked Exhibit "C," and prayed to be taken and considered as a part hereof, the same as though set forth herein *and hæc verba*.

18. Your orator further shows that at a meeting of the city council of said defendant, The City of Helena, held on the third day of April, 1901, a preamble and resolution was passed and adopted by said city council, and approved by the mayor of said city, a copy of which is hereto attached, marked Exhibit "D," and prayed to be taken and considered as a part hereof the same as though set forth herein *in hæc verba*.

19. That pursuant to said resolution the mayor and city clerk of said city issued and signed warrants on the treasurer of said city, amounting in the aggregate to the sum of $30,000, in payment for the water rights and property mentioned and described in said preamble and resolution, which said warrants were delivered to the
10 several parties named in said preamble and resolution, and by them presented to the city treasurer of said city, and paid out of funds and moneys in the treasury of said city derived from taxes levied and collected by said city for general municipal and administrative purposes, whereby $30,000 of the funds and money of said city was misappropriated and misapplied. That the deeds mentioned and referred to in the said preamble and resolution were

at the time of the delivery of said warrants delivered to and accepted by said defendant, The City of Helena.

20. And your orator further shows that the said defendant, The City of Helena, pursuant to said ordinance No 483, has commenced an action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against certain of the owners and claimants of the right to the use of the waters of McClellan creek, a stream of water situate in Jefferson county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClellan creek to supply the said city of Helena and its inhabitants with water, which said action is now pending and undetermined.

21. That heretofore in the month of January, 1895, the defendant, City of Helena, commenced an action or proceeding in the district court of the first judicial district, of the State of Montana, in and for the county of Lewis and Clarke, against the said Helena Consolidated Water Company, to obtain the issuance by said court of a writ of mandamus, requiring and commanding the said
11 company to furnish water to said city for fire, sewerage, and other municipal purposes; that in said action or proceeding it was finally adjudged and determined that the said Helena Consolidated Water Company was in duty bound and obligated to furnish water to said city for such purposes, by virtue of having received the franchise granted by, and having accepted the terms, conditions and provisions of said ordinance No. 248, and a final judgment was rendered and entered by said court therein directing and ordering a peremptory writ of mandamus to issue, commanding and requiring the said company to furnish water to said city for such purposes; that no appeal has ever been taken from said judgment, and the same is now and has been at all times since its rendition in full force and effect.

22. And your orator further shows that the indebtedness of the defendant, The City of Helena, is now and has been for several years last past in excess of three per cent. of the assessed value of all the taxable property in said city as determined by the assessment for State and county taxes during each and all of said years; that said indebtedness is now and has been for several years last past in excess of the sum of $516,000, and the value of the taxable property in said city during all of said time as determined by the assessment for State and county taxes, for each of said years, does not and has not exceeded the sum of $13,000,000.

23. And your orator further shows that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for
12 a water plant, water system, or water supply, to be owned and controlled by said city has been submitted to the qualified electors of said city.

24. And your orator further shows that the said defendant, The City of Helena, has never given your orator notice that it desires to

purchase the plant, franchise, or water supply of your orator, and no effort has ever been made by said defendant, The City of Helena, to agree with your orator upon the terms of such a purchase, or acquire the supply and plant of your orator.

25. And your orator further shows that said defendant, The City of Helena, claims and pretends to have authority to issue bonds and contract an indebtedness for a water supply and system to be owned and controlled by said city, and the revenues from which shall be devoted to the payment of the indebtedness incurred therefor, and that said defendant, The City of Helena, threatens to and will, as your orator is informed, verily believes and alleges, issue said bonds and contract such indebtedness unless restrained and enjoined from so doing by this honorable court.

26. And your orator further shows that it is the intention of the defendant, The City of Helena, to acquire a supply of water in addition to the supply it has already acquired by the purchase of the right to the use of the waters of Beaver creek, as aforesaid, and also a water plant and system in the said city of Helena, for the purpose of supplying said city and the inhabitants thereof with water, and threatens to and will, as your orator is informed, verily believes and alleges, acquire such supply
13 and system and engage in the business of furnishing said city and its inhabitants with water, unless enjoined and restrained from so doing by this honorable court.

27. And your orator further shows and alleges that the said ordinances numbered respectively 467 and 483, and the preamble and resolution adopted and approved as aforesaid, impair the obligation of the contract between your orator and said city resulting from the passage, approval and acceptance of said ordinance No. 248, in violation of section 11, article III of the constitution of the State of Montana, and section 10, article I of the Constitution of the United States.

28. And your orator further shows that if said defendant The City of Helena is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system and supply of water and in engaging to furnish water to said city and its inhabitants, the franchise granted by said ordinance No. 248, and all rights and privileges conferred thereby and the contract contained therein will be greatly depreciated in value, and the property of your orator, consisting of said water plant and system, franchise and contract, will be confiscated and taken without just compensation being first paid therefor, in violation of section 14 of article III of the constitution of the State of Montana.

29. And your orator further shows that if the said defendant The City of Helena is not enjoined and restrained from carrying out its design and purpose of acquiring a water plant and system
14 and supply, and from engaging in furnishing the said city and its inhabitants with water, it will, as your orator is informed, verily believes and alleges, acquire such plant, system, and supply and engage in said business, thereby taking the property of

your orator, consisting of the franchise granted by said ordinance No. 248, the rights and privileges conferred thereby, the contract contained therein, and the water plant, system and supply of your orator, without due process of law, and in violation of the fourteenth amendment to the Constitution of the United States.

30. Your orator further shows that if said defendant is not enjoined and restrained from acquiring such plant and supply, and engaging in said business of furnishing said city of Helena and its inhabitants with water, it will, as your orator is informed and verily believes and so alleges, acquire such plant and supply and engage in such business, and that a large amount of taxes will be levied and assessed against the property of your orator, and collected from your orator, with which to pay the indebtedness which will be incurred in procuring such system and supply, whereby your orator will be compelled to contribute to the destruction of its business and property.

31. And your orator further shows that if said city acquires such water plant and system and engages in the business of furnishing water to said city and its inhabitants, the same will result in great and irreparable injury and damage to your orator both as a taxpayer in said city and as the owner and holder of the rights,
15 privileges and franchises granted by said ordinance No. 248, the contract contained therein, and the said water supply, plant and system.

32. That your orator has no plain, speedy, or adequate remedy in the ordinary course of the law.

In consideration whereof, and forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator should not have the relief prayed, and may make full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its remembrance, knowledge, information, and belief, full, true, direct and perfect answers make to the matters hereinbefore stated and charged; but not under oath, an answer under oath being expressly waived;

Your orator, to the end that it may obtain the relief to which it is justly entitled in the premises, prays the court to grant to it your writ of subpœna directed to the said def-ndant, The City of Helena, requiring it to appear herein and answer to the several allegations in this bill contained.

That your honors grant unto your orator your writ of injunction commanding the said defendant and each and all of its officers, agents, servants, and employees, to absolutely desist and refrain from erecting, constructing, purchasing, or otherwise acquiring, a water plant and system, and from acquiring a water supply, to be owned and controlled by said city for the purpose of furnishing said city and its inhabitants, or any thereof, with water, except the water plant, system, and supply of your orator, and from engaging
16 in the business of furnishing said city and its inhabitants, or any thereof, with water, except in the event it acquires the

plant, system and supply of your orator; and from incurring any indebtedness or expending any money therefor; and until such time as your honors shall direct and appoint a hearing herein.

That said defendant, its officers, agents, servants, and employees, and each of them, be restrained from the commission of any of the acts or doings herein sought to be enjoined, and that upon such hearing the writ herein prayed for pending this suit be made and confirmed until the final determination of this suit, and that thereupon said injunction be made perpetual.

And that your orator may have such other and further relief, preliminary and final, as to the court may seem meet and proper, and which equity may require, and for costs.

CLAYBERG & GUNN,
Solicitors and of Counsel for Complainant.

UNITED STATES OF AMERICA,
District of Montana, State of Montana, } *ss:*
County of Lewis and Clarke,

William A. Chessman, being duly sworn on his oath, deposes and says: That he is the agent of The Helena Water Works Company, the complainant in the foregoing bill of complaint, and makes this affidavit for and in behalf of said complainant; that he has read said bill of complaint and knows the contents thereof,
17 and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to such matters he believes it to be true.

WM. A. CHESSMAN.

Subscribed and sworn to before me this 12th day of April, 1901.

JNO. K. SCOTT,
Notary Public, Lewis and Clarke County, State of Montana.

EXHIBIT "A."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent," for a period of forty days, to wit, from the 13th day of June, 1899, to the 1st day of August, 1899, with specifications, for proposals for a water supply for the use of said city and the inhabitants thereof; and,

Whereas, it was found and determined upon an examination of the several proposals received in response to such advertisement,

and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of the said George F. Woolston; and,

18 Whereas, the city council of the said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor.

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds, of said city with water mains and pipes, or the exclusive right of conveying,

19 distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping, and maintaining such water mains and pipes there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds, and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other material.

SEC. 3. All pipes and mains including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting

giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the fran-
20 chises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations, to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes be laid and maintained under the provisions of *this in any manner* interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said City of Helena by mains hereafter laid by the said Helena Consolidated Water Company or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

21 SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the square inch ordinary pressure shall be maintained at said points and all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay

or provide at its own cost and expense twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes and on the following streets in the said city of Helena, respectively: At least ten
22 inches in inner diameter on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street; at least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street; in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue *to* Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue; at least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Flowerree street; on Lawrence street from Madison avenue to the western boundary of city; on Clarke street from Strawberry street to Clore street; on Howie street from Adams street to Clarke street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howie street; on Bridge street from Clore street to Chaucer street; on West Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Teitjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue;
23 on Third street, Northern Pacific addition, from Helena avenue north 500 feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway; at least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckenridge street to Beattie street; on Eighth avenue, from Eighth avenue to Hoback street; on Eleventh avenue from Rodney street to Hoback street; on Hoback street from Eleventh to Pflaume street; at least three inches in inner diameter on Davis street in Hauser addition from Madison avenue to Benton avenue; on Strawberry street from Clarke street to Lawrence; on Adams from Howie street to Jefferson street; on Davis street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains, the said Helena

Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains and pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the
24 said city council of the said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city and formerly belonging to the Helena Water Company, such hydrants need not be changed or renewed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council shall from time to time direct,
25 which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six inches, then one hydrant for each one-seventh of a mile, said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes, in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand-pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the

lines and mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

26 SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the 1st day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

SEC. 15. Said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said City of Helena and the Helena Water Company and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies or corporations in this city shall not exceed the following rates: For private houses, $1 per month; for each private bathtub, 33 cents per month; for each private wash-basin, 25 cents per month; for each pri-

27 vate water-closet 33 cents per month; for each private urinal, 33 cents per month. For irrigating lawns, gardens and grounds, where other water is taken, $1.25 per month, for each fifty feet fronting on the street; where no other water is taken, $1.50 per month. When revolving fountains and sprinklers are used, an extra price may be charged, which shall not exceed twenty-five per cent. in addition to the rate for irrigation above prescribed; provided, however, there shall not be more than one nozzle or sprinkler used for each fifty feet of frontage, at the rate specified in this section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any person or persons, corporation or corporations, or company, shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water for the time so used,

upon the same terms per month as above stated. Where meters are used, the charge shall not exceed the following rates, viz: For 1,000 gallons per day or less, 4 cents per 100 gallons; for 1,000 to 4,000 gallons per day, 3 cents per 100 gallons; for 4,000 gallons per day or more, 2 cents per 100 gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over 33 per cent. more water than the monthly rate would pay for, according to the meter rates herein prescribed, the said water company shall
28 only be allowed to collect the monthly rate herein provided. If the said consumer is using over 33 per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company; provided, always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stop-cock on each service pipe, below the sidewalk near the curb, at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the
29 water rates are not paid within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company, but the said company shall not place any self-closing faucet or water-bib upon any service pipe without the consent of the owner thereof.

SEC. 19. No person or persons, excepting the mayor and fire marshal, or those acting under their authority, or the authority of the said city council, and the agents and employees of the said water company, shall meddle with or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said

Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the Woolston reservoir, or in the reservoir formerly belonging to Helena Water Company, and commonly known as the Hale reservoir, a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SECTION 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors and assigns, during the full term of five years from and after the 20th day of January, 1890, the following sums of money, to wit: Out of
30 the general fund of said city the sum of twenty dollars per years for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance to be kept and maintained by said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council, during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized upon allowance by the city council to draw warrants on the above funds for the above amounts and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month; provided, however, that if the
31 said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day which said forfeit shall be paid before said company shall receive any further payment from said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action, or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

32 SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water under the provisions of this ordinance and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of $50,000, with two or more sufficient sureties to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomso-

33 ever the same may be due, or become created by, or in any manner arising from ordinance No. 93, approved November 22, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston and the Helena Water Company of Salem Ohio, from all claims against said city to the date of this contract arising from the ordinance in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15th, 1890.

EXHIBIT "B."

Ordinance No. 467.

An ordinance relating to the procurement of a water system and supply for the city of Helena, which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of the question of
34 extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6 of article XIII of the constitution of the State of Montana, for the purpose of securing such water system and supply.

Be it ordained by the city council of the city of Helena:

SECTION 1. That it is desirable for the city of Helena to procure a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor.

SEC. 2. That the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes is the sum of twelve million two hundred and eighty-seven thousand five hundred and ten dollars ($12,287,510); that the present existing indebtedness equals at least three per cent. of the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes; that it is necessary to extend the limit of indebtedness mentioned in section 6 of article XIII of the constitution of the State of Montana in order to procure a water system and supply for said city.

SEC. 3. That the question of extending such limit of indebtedness to five per centum over and above the three per cent. fixed by section 6 of article XIII of the constitution of the State of Montana, as provided by subdivision 64 of section 4800 of the Political Code and amendments thereof for the purpose of procuring a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom
35 to the payment of the debt incurred therefor, be submitted to a vote of the taxpayers affected thereby at a special election to be held on the 18th day of January, 1900.

SEC. 4. That the city clerk be and he is hereby authorized and directed to publish notice of such election in some newspaper published in the city, and post such notice in not less than three public places in said city, such publication and posting to be for a period of not less than three weeks prior to such election, such notice shall be in the following form:

Notice of Election.

To the taxpayers of the city of Helena, Montana, affected by an extension of the limit of indebtedness of said city to five per centum (5%) over and above the three per cent. (provided by section 6 of article XIII of the constitution of the State of Montana) of the total assessed valuation of the taxable property of said city of Helena as ascertained by the last assessment for State and county taxes:

Notice is hereby given that a special election of the taxpayers will be held on the 18th day of January, A. D. 1900, from eight o'clock a. m. to six o'clock p. m. for the purpose of submitting to the taxpayers of said city qualified to vote thereon the question whether or not pursuant to the provisions of section 6 of article XIII of the constitution of the State of Montana and the acts of the Legislative Assembly in pursuance thereof and applicable thereto, the limit of the indebtedness of said city of Helena shall be extended to
36 five per centum over and above the three per cent. (provided by section 6 of article XIII of the constitution of the State of Montana), of the total assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes for the purpose of procuring a water supply and system for said city which shall own and control said water supply and system, and devote the revenues derived therefrom to the payment of the debt incurred therefor.

That the places for holding such election in said city will be as follows:

First ward: 112 State street.
Second ward: 13 North Jackson street, Ming's opera house.
Third ward: 24 Park avenue, Israel block.
Fourth ward: Auditorium.
Fifth ward: Hose house, 550 Spruce street.
Sixth ward: Fire station.
Seventh ward: Fire station.
By order of the city council.
Dated November 8th, 1899.

EDWARD HORSKY, *City Clerk.*

SEC. 5. That the time, place and purpose of holding such election shall be as specified in said notice, and the ballots to be used at such election shall be of ordinary paper, four by four inches in size, and of the following form:

37 *City Water Plant.*

Extension of the limit of indebtedness of the city of Helena, Montana, to five (5) per centum over and above the three per cent. fixed by section 6 of article XIII of the constitution of the State of Montana of the assessed valuation of the taxable property of said city as ascertained by the last assessment for State and county taxes, for the purpose of procuring a water system and supply for said city which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor.

Extension of the limit of indebtedness to procure a water system and supply, "Yes."

Extension of limit of indebtedness to procure a water system and supply, "No."

The voter must make a cross "X" opposite the answer he intends to vote for.

SECTION 6. That the city (clerk) be and he is hereby authorized and directed to take all necessary steps and proceedings and do all things required by law for the holding of such election.

SECTION 7. All ordinances and parts of ordinances in conflict with any of the provisions hereof are hereby repealed.

Passed and approved this fourth day of December, 1899.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk.*

38 EXHIBIT "C."

Ordinance No. 483.

Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek and those water rights of Prickley Pear creek comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose.

Be it ordained by the city council of the city of Helena:

SECTION 1. That ordinance No. 482 of the city of Helena, Montana, passed and approved the 20th day of September, A. D. 1900, be amended to read as follows, to wit:

SEC. 2. Whereas, the city of Helena, Montana, has not now and never has had a water supply or water system of its own, and whereas, by an affirmative vote of the majority of the taxpayers of the city of Helena, Montana, at an election duly held on the 18th day of January, 1900, it was duly voted to extend the constitutional limit of said city five per centum over and above the three per cent.

limit fixed by section 6 of article XIII of the constitution of the State of Montana for the purpose of procuring a water supply and system for said city which shall own and control said water supply and system, and devote the revenues derived therefrom to the payment of the debt incurred therefor, and thereafter, to wit, on
39 the 4th day of June, 1900, by ordinance No. 477 of the said city duly passed and approved in accordance therewith, said limit of indebtedness was duly declared extended as aforesaid; and whereas, the city council thereafter duly advertised for and received bids for a water supply, and for a water supply and system; as aforesaid, and among others was that of John B. Sanford, as trustee, for what is known as the Turner water right or Crystal Creek ditch comprising the waters of Crystal creek, Lost creek and Jackson creek, all tributaries of said McClellan creek in the county of Jefferson, in the State of Montana, but that the amount of said bid for the water therein mentioned is too high, and the amount of water thereby covered is not in itself a sufficient quantity, and there being no other bids for said water supply, and all bids whatsoever for water for said purposes having been rejected, and that it will be necessary to obtain the said water right and other waters in said McClellan creek and its tributaries; and whereas, it is desirable and advisable for the best business, sanitary and domestic interests of said city and its inhabitants that it should procure a good, pure, wholesome and abundant supply of water and a water system for said city which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and whereas, the said city council has carefully considered the various bids submitted as aforesaid, and in addition thereto has investigated many other sources of water to supply said city, and as the result thereof are of the opinion that all things considered the waters of said McClellan creek and its tributaries
40 will constitute the best water supply for said city, the quantity, quality, distance, price and all things considered.

SEC. 3. That of the water and water rights of said McClellan creek and its tributaries situate in Broadwater, Lewis and Clarke and Jefferson counties, State of Montana, and all those waters of Prickley Pear creek situate in Jefferson and Lewis and Clarke counties, State of Montana, comprising the waters of said McClellan creek, three hundred and fifty inches be condemned for the purpose of securing a water supply for said city of Helena which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor.

SEC. 4. That the city attorney is hereby authorized and instructed to institute such suit or other proceedings as may be necessary for the condemnation of said water and water rights for said purpose.

Passed and approved this 3d day of December, 1900.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk,*
By ALDERMAN WENDEL.

EXHIBIT "D."

Whereas, it is the wish and desire of the taxpayers of the city of Helena, as expressed by their votes at an election duly called and held for that purpose, that the said city shall own, control, and operate its own water system and supply, with a view of supplying said city and its inhabitants with water for fire, sewerage, and domestic purposes; and

41 Whereas, in order that the wish of said taxpayers, so expressed, may be carried out and made possible, it is necessary that the city shall acquire and own a water supply; and

Whereas, an option has been obtained by the city for the purchase and ownership of sufficient of the waters of what is known as Beaver creek, in Broadwater county, Montana, in the quantity and for the considerations hereinafter stated; and

Whereas, the necessary surveys have been made, determining and demonstrating that such supply can be delivered by gravity at a point in the city higher than the Hale reservoir; and

Whereas, the following deeds have heretofore been duly executed, and are now on deposit in escrow for the quantity of water expressed in each as hereinafter set forth, to be delivered to the city of Helena upon payment of the amounts hereinafter specified, to wit: From Julia Reynolds and C. W. Reynolds, for 67 inches of water, consideration, $3,000; from George Beatty, for 67 inches of water, $4,500; from Andrew T. Thompson for his interest in 60 inches of water, $500; from Antone Semenec, for his interest in 60 inches of water, $2,500; from W. R. Davies, for 67 inches of water, $3,000; from Mrs. Amelia Falen for 67 inches of water, $3,000; from James S. Smith, for 1,000 inches of water known as French Bar and Indian Creek water rights, $10,000; from James S. Smith, for placer ground and bedrock water on Beaver creek, $3,500; making a total consideration or purchase price of $30,000; and

42 Whereas, it is the judgment of this council that the said water rights, privileges and property are of great value; that the consideration asked for the same is reasonable; that the same are available and desirous for the use of the city for the purposes hereinbefore stated; and that the best interests of the city and its inhabitants will be served by paying the said several sums amounting in the aggregate to $30,000 and taking up the aforesaid deeds, and

Whereas, there is now on hand in the treasury of the city a surplus of cash sufficient for the purpose of purchasing and acquiring the water, said water rights, privileges and property, over and above the amount necessary for general municipal and administrative purposes and for current expenses, without incurring any indebtedness in excess of the constitutional limit; and

Whereas, the payment of cash as herein contemplated, will save the city whatever interest might accrue on the bonds issued in payment of the aforesaid property; and

Whereas, the actual purchase of a water supply, and the actual payment therefor in cash, will determine beyond question that the city of Helena will, at the earliest possible date, own, control and operate an independent supply of pure and wholesome water with a pressure sufficient to justify insurance companies in making to the insured the lowest possible rates, and which will save the city from total destruction if a fire should get a fairly good start at some central point, which, owing to the notorious inadequacy and insufficiency of the present plant and supply, is not a possibility at this time.

43 Therefore be it resolved, by the city council of the city of Helena, That the said city of Helena do purchase and acquire the water rights, privileges and property aforesaid, as particularly set forth in said deeds so placed in escrow as aforesaid, at and for the consideration and prices aforesaid, and that the mayor and city attorney be and they are hereby authorized and empowered to issue and sign warrants of the city in the several amounts hereinbefore stated, amounting in the aggregate to the sum of $30,000, for the purpose of taking up said deeds so in escrow, and to pay over and use said warrants for that purpose, and take up and cause to be duly recorded, the said several deeds.

And to that end the said mayor and city attorney are hereby authorized to incur the expense necessary to carry out the authority hereby granted.

This resolution to take effect and be in force from and after its passage and approval.

Passed and approved this 3d day of April, 1901.

F. J. EDWARDS, *Mayor.*

Attest: EDWARD HORSKY, *City Clerk.*

(Endorsed:) Title of court and cause. Bill of complaint. Filed and entered April 12, 1901. Geo. W. Sproule, clerk.

44 And thereafter, to wit, on the 12th day of April, a subpœna in equity was duly issued, which said subpœna is entered of final record as follows:

Subpœna ad Respondendum.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, District of Montana. In Equity.

The President of the United States of America to The City of Helena, defendant, Greeting:

You are hereby commanded that you be and appear in said circuit court of the United States aforesaid, at the courtroom in Helena,

on the 6th day of May, A. D., 1901, to answer a bill of complaint exhibited against you in said court by The Helena Water Works Company, complainant, who is a citizen of the State of New Jersey, and to do and receive what the said court shall have considered in that behalf. And this you are not to omit under the penalty of five thousand dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 12th day of April, in the year of our Lord one thousand nine hundred and one, and of our Independence the 125th.

[SEAL] GEO. W. SPROULE, *Clerk.*

45 *Memorandum Pursuant to Rule* 12, *Supreme Court U. S.*

You are hereby required to enter your appearance in the above suit, on or before the first Monday of May next, at the clerk's office of said court, pursuant to said bill; otherwise the said bill will be taken *pro confesso.*

[SEAL.] GEO. W. SPROULE, *Clerk.*

CLAYBERG & GUNN,
Solicitors for Complainant, Helena, Montana.

Attest:
A true copy.
[SEAL.] GEO. W. SPROULE, *Clerk.*

UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF MONTANA.

I hereby certify that I received the within writ on the 12th day of April, 1901, and personally served the same on the 12th day of April, 1901, on the City of Helena, by delivering to, and leaving with Frank J. Edwards, mayor of the city of Helena, for said defendant named therein personally, at Helena, in the county of Lewis and Clarke, in said district, a copy thereof.

Helena, April 12, 1901.

J. P. WOOLMAN,
United States Marshal,
By C. F. GAGE, *Deputy.*

46 (Endorsed:) No. 619. United States circuit court, ninth circuit, district of Montana. In equity. The Helena Water Works Company *vs.* The City of Helena. Subpœna. Filed April 12, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 13th day of May, 1901, a demurrer was filed herein, which said demurrer is entered of final record as follows, to wit:

In the United States Circuit Court, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. —.

Demurrer.

The demurrer of The City of Helena, the defendant above named, to the bill of complaint of The Helena Water Works Company, the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows unto this honorable court the following, viz.:

a. Said bill of complaint does not state facts sufficient to
47 entitle plaintiff to the relief demanded, or any other relief.

b. Said bill does not state facts sufficient to entitle plaintiff to the relief demanded, or any relief, either under the alleged contract or in the capacity of a taxpayer.

c. Said bill of complaint is altogether multifarious in that it appears thereby that the same is exhibited against the defendant upon two distinct and separate alleged causes of suit, and two separate and distinct matters, each complete within itself in this, to wit: A cause of suit upon the alleged contract, and a cause of suit in the capacity of taxpayer of said city of Helena.

d. Said bill of complaint is also altogether multifarious in that in connection with the alleged cause of suit upon contract, and an alleged cause of suit as taxpayer, it also attempts to set up a cause of suit for threatening to take the property of plaintiff without due process of law.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

EDWARD HORSKY,
City Attorney.
TOOLE & BACH,
Solicitors for Defendant.

48 DISTRICT OF MONTANA, }
County of Lewis and Clarke, } *ss:*

Edward Horsky makes oath and says: That he is the city clerk and attorney of and attorney for defendant City of Helena, in the

above-entitled cause, and that the foregoing demurrer is not interposed for delay, and that the same is true in point of fact.

EDWARD HORSKY.

Subscribed and sworn to before me this thirteenth day of May, 1901.

CHARLES R. GARLOW,
Notary Public in and for Lewis and Clarke County, State of Montana.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

EDWARD HORSKY,
Of Counsel for Defendant.

(Endorsed:) Title of court and cause. Demurrer to bill. Filed May 13th, 1901. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 16th day of May, A. D. 1901, a plea to the bill of complaint was filed herein, which said plea was entered of final record as follows, to wit:

49 In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Plea.

The plea of The City of Helena, the above-named defendant, to the bill of complaint of The Helena Water Works Company, the above-named complainant.

To the honorable the judge of the circuit court of the United States, ninth circuit, district of Montana:

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill to be true in such manner and form as the same are therein set forth and alleged, for plea to the whole of said bill, says that on or about the — day of October, A. D. 1900, a certain action was commenced by the above-named defendant, City of Helena, pursuant to an ordinance of the city council of said city of Helena, theretofore duly passed and adopted, in the district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county,
50 against the owners or claimants of those water rights of Prickly Pear creek, comprising the waters of McClellan creek, and taken from that portion of said Prickly Pear creek lying wholly

in the said county of Lewis and Clarke, State of Montana, for the purpose of condemning three hundred and fifty (350) inches of said water rights of Prickly Pear creek, comprising the waters of said McClellan creek, to supply the said city of Helena and its inhabitants with water, which said suit is now pending in said district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county.

And defendant further says that on or about the — day of February, A. D. 1901, the above-named defendant, The City of Helena, commenced a certain action in the district court of the fifth judicial district of the State of Montana, in and for Jefferson county, pursuant to ordinance No. 483, duly passed and adopted by the city council of said city of Helena, and approved by the mayor, on the third day of December, A. D. 1900, a copy of which said ordinance is more fully described in and set *in hæc verba* and made a part of the bill of complaint herein, against the owners or claimants of the right to the use of the waters of McClellan creek, a stream of water situated in Jefferson county, State of Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of three hundred and fifty (350) inches of the waters of said McClellan creek, to supply the said city of Helena and its inhabitants with water, each of which said actions is now pending and undetermined, and on account whereof this court has no juris-
51 diction to in any manner interfere with said proceedings in either of said district courts, or any thereof, of the legitimate results thereof.

And defendant further says that there is now pending in the district court of the first judicial district of the State of Montana, in and for Lewis and Clarke county, an action between complainant herein, as plaintiff, and the defendant herein as defendant, which said action was commenced prior to the filing of the bill of complaint herein, namely, on the 5th day of April, 1901, for the purpose of obtaining a temporary injunction, enjoining and restraining said City of Helena, from allowing or ordering paid any claims or demands presented for materials furnished or services rendered said city during the time it has been or will be indebted in excess of three per cent. of the assessed value of the taxable property as ascertained by the last assessment for State and county taxes, except the claims and demands of this complainant for water furnished said city, or which may hereafter be furnished said city, and requiring and commanding the city clerk and mayor of said city to desist and refrain from signing or issuing warrants for any such claims or demands, and commanding and requiring the city treasurer of said city to desist and refrain from paying any warrants issued on account thereof, and the said City of Helena then was and ever since has been and now is enjoined and restrained from doing any of said acts mentioned, and from issuing any warrant or warrants or paying out any money for any purpose whatsoever; which said
52 action is now still pending and undetermined in said district court, and on account whereof this court has no jurisdiction

to in any manner interfere with any of the proceedings in said district court, or any thereof, or the legitimate results thereof.

And defendant further says that on or about the — day of March, A. D. 1900, Harry B. Palmer commenced a certain action in the district court for the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against said defendant City of Helena, for the purpose of enjoining and restraining said city and the city counsel thereof, from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of the said city exceeded or exceeds three per cent. of the assessed value of the taxable property in said city of Helena, as ascertained and shown by the last assessment of said property for State and county taxes, prior to the incurring, creating, or contracting said indebtedness, which said action is still pending and undetermined, and on account whereof this court has no jurisdiction to in any manner interfere with said proceedings in said district court, or any thereof, or the legitimate results thereof.

All of which matters and things said defendant doth aver to be true, and it pleads to said complainant's bill, and prays the judgment of this honorable court, whether it shall be compelled to make any other or further answer to said bill, and prays to be
53 hence dismissed with its costs and charges in that behalf most wrongfully sustained.

EDWARD HORSKY,
R. LEE WORD, AND
TOOLE & BACH,
Of Counsel for Defendant.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

EDWARD HORSKY,
Of Counsel for Defendant.

STATE OF MONTANA, }
County of Lewis and Clarke, } ss:

Edward Horsky, being first duly sworn, says that he is an officer of the above-named defendant, to wit, the city clerk thereof; and that the foregoing plea is true in point of fact and not interposed for delay.

EDWARD HORSKY.

Subscribed and sworn to before me this 16th day of May, A. D. 1901.

CHARLES R. GARLOW,
Notary Public in and for Lewis and Clarke County, State of Montana.

Due service of the foregoing plea and receipt of a true copy thereof are hereby acknowledged and admitted this 16th day of May, 1901.

CLAYBERG & GUNN,
Attorneys for Complainant.

(Endorsed:) Title of court and cause. Plea. Filed May 16, 1901. Geo. W. Sproule, clerk.

54 And thereafter, to wit, on the 23d day of December, 1901, an order was duly made and entered overruling defendant's demurrer and plea, which said order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order Overruling Demurrer and Plea.

This cause came on regularly at this time for the decision of the court, and, after due consideration, it is ordered that a temporary injunction issue herein as prayed for in complainant's bill of complaint and motion, upon said complain-t giving a bond in the sum of twenty-five thousand dollars ($25,000), within ten days.

And it is further ordered that defendant's demurrer to bill of complaint of complainant be, and the same hereby is, overruled.

And it is further ordered that the plea of defendant be and the same hereby is overruled.

Done in open court, December 23d, 1901.

55 And thereafter, to wit, on the 21st day of February, 1902, an answer was filed herein, which said answer is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. —.

Answer to Bill of Complaint.

Now comes the defendant, The City of Helena, and files its answer to the complaint of the plaintiff herein, and charges and avers:

This defendant now, and at all times hereafter, saving to itself

all and all manner of benefit of exceptions or otherwise that can or may be had or taken to the many errors, uncertainties, or imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised is material or necessary for it to make answer to, answering says:

I.

Admits the allegations contained in paragraphs 1 to 18 of plaintiff's bill of complaint, except as hereinafter set forth; and that this defendant denies that the said plaintiff or its predecessors in
56 interest has complied with all the terms and conditions contained in the said ordinance No. 248, as set forth in said bill of complaint, or that it has substantially complied with the material requirements thereof.

II.

Denies that the water system and supply of said Helena Consolidated Water Company was accepted by said defendant City of Helena, as complying with the requirements of said ordinance No. 248, or in any other manner, or at all, other than as hereinafter set forth.

III.

Denies that the said James H. Mills, as receiver, as alleged in said bill of complaint, furnished water in compliance with the terms or provisions of said ordinance No. 248, or the contract embraced therein, or that he carried on and conducted the business of said company as in said bill set forth, and further denies that he complied with all or any of the terms, or conditions, or provisions, of said ordinance No. 248, or the contract contained therein on the part of the said Helena Consolidated Water Company, or its successors or assigns.

IV.

Denies that The Helena Water Company, the complainant in said action, has complied either fully or otherwise, or in any manner, or at all, with the terms, or provisions, or conditions, of the said ordinance No. 248, or the contract therein contained, on the part of the said Helena Consolidated Water Company, its successors or assigns, to be kept and performed.

57 V.

Admits that in the month of December, 1899, the city council of the said defendant City of Helena, passed and adopted ordinance No. 467 entitled, "An ordinance relating to the procurement of a water system and supply for the city of Helena, which shall own and control said water system and supply and devote the revenues derived therefrom to the payment of the debt incurred therefor, and providing for the submission to the taxpayers affected thereby of

the question of extending the limit of indebtedness of said city over and above the three per cent. limit provided by section 6, of article XIII, of the constitution of the State of Montana, for the purpose of securing such water system and supply;" and admits that said ordinance was approved by the mayor of said city on the fourth day of December, 1899, as alleged in said bill of complaint; denies that said complainant or its predecessors in interest have, for more than ten years, or at any time last past, furnished water to the said city, and the inhabitants thereof, through the said water plant and system owned and controlled by it, and avers that it only furnished water to a portion of the inhabitants of said city, and then in insufficient quantity and quality to meet the necessities thereof, in accordance with the terms of said ordinance. And denies that the said City of Helena has accepted and used such water during all of said time, or any of said time, except for the reason that it
58 had no other source of supply. And denies that the same was furnished in accordance with the requirements of said ordinance.

VI.

Defendant further admits that notice of an election was given and published for the time and in the manner provided by said ordinance, and that judges of election were appointed by the mayor of said city, and that said election was held on the eighteenth day of January, 1900, as by said ordinance required, and that a majority of the voters who voted at said election voted "Yes," and in favor of the proposition of extending the limit of indebtedness of said city to procure a water system and supply, as determined by the city council of said city upon canvassing said votes, and that the assessed value of the taxable property of the said city of Helena, was and is as stated in said bill of complaint; and admits that in the month of December, 1900, the said city council of said defendant, The City of Helena, duly passed and adopted ordinance No. 483, entitled, "Amending ordinance No. 482, authorizing the taking of all the water and water rights of McClellan creek and those water rights of Prickly Pear creek, comprising the waters of said McClellan creek, for the purpose of procuring a water supply for the city of Helena, Montana, which shall own and control the same, and authorizing the commencement of condemnation proceedings for such purpose." And that said ordinance was approved by the mayor of said city on the 3d day of December, 1900; and admits that at a meeting of the city council of the said defendant City of Helena, held on the 3d day of April, 1901, a preamble
59 and resolution was passed and adopted by said city council and approved by the mayor of said city as shown by Exhibit "D," referred to in said bill of complaint; and admits that the city purchased and paid for the water rights mentioned and described in paragraph 19 of the said bill of complaint, and avers that by virtue of its said purchase, and the payment therefor, it became and is the owner of said water rights, and that deeds were executed and

received, as in said paragraph stated; and this defendant avers that being so the owner of said water rights the same cannot be questioned by the said plaintiff, nor can its right to hold possession and use the same be questioned, except upon proceedings instituted in behalf of said State of Montana; and denies that said money was misapplied or misappropriated.

VII.

And this defendant, for answer to paragraph 20 of said bill of complaint, admits that it did, pursuant to said ordinance 483, commence an action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against certain of the owners and claimants of the right to use of the waters of McClelland creek, a stream of water situate in Jefferson county, Montana, and tributary to Prickly Pear creek, and flowing through said Lewis and Clarke county, Montana, for the purpose of acquiring by the exercise of the right of eminent domain the right to the use of 350 inches of the waters of said McClelland creek to supply the said city of Helena and its inhabitants with water, which said action is now pending and undetermined; and
60 defendant avers that on account thereof this court has no jurisdiction to interfere with any of the said proceedings in said district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, or in any of the legitimate results thereof, or in any of the rights that the said defendant may acquire under and by virtue of the said action, or in any of the rights of the said plaintiff which may be concluded thereby, which said action is in the nature of a proceeding *in rem*, and in which all parties interested may appear and defend or set up any right or equity they may have in the premises, and avers that this court has no right or power under the laws of Congress to in any manner interfere with the expenditures required for the prosecution of the said suit, or in any of the proceedings in that behalf, or in any proceeding proper or necessary to be had in said action, which said facts, in connection with said action, will more fully appear by the judgment roll therein, to which reference is hereby made.

VIII.

And this defendant admits that in the month of January, 1895, the defendant City of Helena commenced an action and proceeding in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against the said Helena Consolidated Water Company, to obtain the issuance by said court of a writ of mandamus requiring and commanding the said company to furnish water to said city for fire, sewerage, and other municipal purposes, that in said action or proceeding it was finally ad-
61 judged and determined that the said Helena Consolidated Water Company was in duty bound and obliged to furnish water to said city for such purposes by virtue of having received the franchise granted by, and having accepted the terms, conditions and

provisions of said ordinance No. 248, and admits that a final judgment was rendered and entered by said court therein directing and ordering a peremptory writ of mandamus to issue, commanding and requiring the said company to furnish water to said city for such purposes; and that no appeal has been taken from said judgment, and that the same is now and has been at all times since its rendition in full force and effect; and this defendant avers that the said Helena Consolidated Water Company, the predecessor in interest of the complainant herein, refused, though requested so to do, to furnish water to the said City of Helena at reasonable rate-, from month to month, without any contract therefor, and thereupon said action was instituted by the said City of Helena to compel the said Helena Consolidated Water Company to furnish said city with water at a reasonable rate, from month to month, until such time as it might see fit to discontinue; and affiant further avers that the said water company was by law charged as a quasi-public corporation and enjoying the rights and privileges of the franchise in said bill of complaint described, and in duty bound to furnish said city with water from month to month at reasonable rates, and it was so adjudicated and determined in said action, by reason whereof the said plaintiff is estopped and concluded from asserting any right or bene-
62 fit under and by virtue of its said contract, and is bound and concluded by the said judgment, all of which will more fully appear by reference to the judgment roll in said cause.

IX.

Admits the allegations contained in paragraph 22 of the said plaintiff's bill of complaint, but denies that this defendant, The City of Helena, has never given complainant herein or its predecessors in interest, notice that it desires to purchase the plant and water supply of complainant, or that no offer has ever been made by said defendant, The City of Helena, to agree with the complainant upon the terms of such a purchase or to acquire the supply and plant of complainant, and avers that on the — day of ——, 1895, the city council of said defendant, City of Helena, duly passed and adopted a certain resolution or ordinance, authorizing the city clerk of said city to advertise for bids in the public daily newspapers of said city of Helena for the construction or purchase of a water system or supply to be owned and controlled by the said defendant, but that said defendant was prevented from so doing as aforesaid under and by virtue of a certain writ of injunction obtained at the instance of the said Helena Consolidated Water Company, the predecessor in interest of complainant herein, in an action wherein the said Helena Consolidated Water Company was plaintiff and the said mayor of the said defendant City of Helena was defendant, in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke; that said ac-
tion was founded upon a certain provision of subdivi-
63 sion of section 4800 of the Political Code of the State of Montana, as amended by the Fifth Legislative Assembly of said

State, commonly known and described as the Phelps Rider bill, and which is contained in the opinion of the court hereinafter referred to, and that said Phelps Rider and the provisions thereof *was* declared unconstitutional and void on appeal from said action of said district court to the supreme court of the State of Montana, as will more fully appear, reference being had to volume 19 of the Montana Reports, page 1.

X.

And this defendant admits that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting on indebtedness for a water plant, or water system, or water supply, to be owned and controlled by said city has been submitted to the qualified electors of said city, as alleged in paragraph 23 of said bill of complaint, but denies that this defendant claims or pretends to have, authority to issue bonds and contract an indebtedness for a water supply and system to be owned and controlled by said city, or that the revenues from which shall be devoted to the payment of the indebtedness incurred therefor, or that said defendant, The City of Helena, threatens to or will issue said bonds or contract such indebtedness, unless restrained or enjoined from so doing by this honorable court, and avers that it does not and did not contemplate doing any of the said acts so complained of, but, on the contrary thereof, that it has been and now is and at all times mentioned in the said bill of complaint it
64 has been the intention, and so expressed at all times and on all occasions, to hold another election, at which election the question of issuing bonds or contracting an indebtedness for a water plant, water system, and water supply, to be owned and controlled by said city, shall be submitted to the qualified electors of said city, in full compliance with the terms and provisions of house bill No. 206, of the Fifth Legislative Assembly of the State of Montana, and in conformity with all the laws of said State applicable thereto.

XI.

This defendant admits that it is its intention to acquire a supply of water in addition to the supply it has already acquired by the purchase of the right to use of the waters of Beaver creek, and also a water plant and system in the city of Helena, for the purpose of supplying said city and the inhabitants thereof with water, and avers that it will do so by means of said action now pending in the district court of said Lewis and Clarke county, and in a certain action of like character now pending in the district court of the fifth judicial district of the State of Montana, in and for the county of Jefferson, on account whereof this court has no jurisdiction to in any manner interfere with the said proceedings, or any thereof, or the legitimate results to be accomplished, or any thereof; and also avers that there is now pending in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke an action between the complainant herein and the said de-

fendant herein, wherein said complainant is plaintiff and
65 this defendant is defendant, and in which said action this defendant has been enjoined and restrained from issuing any warrants or paying out any money, for any purpose whatsoever, on account whereof this court has no jurisdiction to interfere with the said proceedings, or any of the matters embraced therein, or which may legally result therefrom. That since the commencement of this action the injunction therein granted, has been dissolved in the district court, and from the order dissolving the same an appeal has been taken by the complainant herein, to the supreme court of the State of Montana, and that such appeal is still pending and undetermined.

XII.

Admits that this defendant intends to acquire a supply of water in addition to the supply it already has acquired, and that it intends to furnish and supply the said city of Helena and the inhabitants thereof with water, unless enjoined and restrained from so doing by this honorable court, and avers that it has, under the laws of said State, and under and in pursuance of the ordinances aforesaid, a perfect right and authority so to do, and denies that said ordinances numbered respectively 467 and 483, and the said preamble and resolution adopted and approved as alleged in said complaint, impair the obligation of the contract between said complainant and said city, or that such results, on account of the approval and acceptance of the said ordinance, No. 248, or that any of the acts and things done or caused to be done by this defendant, is in violation of section 11, article III of the constitution of the State of Montana, or section 10, article I of the Constitution of the United States,
66 and denies that unless this defendant is enjoined or restrained from carrying out its said design and purpose of acquiring a water plant and system and supply, or in engaging to furnish water to said city and its inhabitants, that the franchise granted by said ordinance No. 248, or any right or privileges conferred thereby, or the contract contained therein, will be confiscated or taken without just compensation or in violation of section 14 of article III of the constitution of the State of Montana, and avers that this defendant has a legal and equitable right to so provide a water plant for the purposes aforesaid, and that having such right, all the depreciations or injury that said complainant may sustain must and should be borne by it, and denies that by reason of this defendant so constructing and maintaining a water plant and supply of its own, and for the purpose of furnishing and supplying the inhabitants of said city with water, that the same will result in taking the property of said plaintiff, or the rights and privileges conferred thereby, without due process of law or in violation of the fourteenth amendment of the Constitution of the United States; and denies that there will be levied and assessed or collected of said complainant any taxes whatever, except such as it is compelled and required to pay as a taxpayer of the said city of Helena, or that any injury or damage

will result to said complainant, except such as it is by law required to undergo and sustain.

I.

And this defendant, for a further and affirmative defense
67 and plea, shows unto this honorable court that heretofore, to wit, on the 14th day of December, 1895, the complainant herein commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, against this defendant, to enjoin and restrain it from taking any proceedings or accepting any bid or bids for the construction, establishment and maintenance of a water system of its own, and being the water system mentioned and described in the bill of complaint herein, and in said action set up its rights under the contract and ordinance in said plaintiff's bill of complaint mentioned; that it was therein alleged and claimed that this defendant, The City of Helena, was not authorized so to construct and maintain said water plant and system, but, on the contrary thereof, was required to purchase the water plant of the said complainant, and that such proceedings were had and done in said cause as that on the eighth day of February, 1897, judgment was duly given and made in said district court in favor of the said complainant herein and against this defendant, enjoining and restraining it from the said acts complained of; that afterwards this defendant duly appealed from said order to the supreme court of the State of Montana, and that on the 20th day of June, 1897, said appeal coming on to be heard, the same was reversed, and the order of said court set aside, on account whereof it has been adjudicated and determined that this defendant is entitled to construct, establish and maintain the said water system in the bill of complaint herein set forth, and on account
68 whereof the said complainant is barred and estopped from maintaining this action concerning all of the said matters so adjudicated as aforesaid; all of which facts will more fully appear, reference being had to the judgment roll in said cause, and the decision by the said supreme court of Montana contained in the 20 Montana Reports, pages 1 to 13, inclusive.

II.

And this defendant avers that it has not and had not any power or authority to confer or secure to said complainant any exclusive right to furnish water to said city or the inhabitants thereof, nor did it do so or attempt to do so by contract, ordinance or otherwise; that under the power conferred upon this defendant it had and has the right to construct and erect a water plant of its own, and purchase or condemn water rights therefor, so as to supply this defendant and the inhabitants of said city with water, whenever in its judgment it was expedient to do so, which said power was and is a public right, and has not been relinquished or conveyed away by contract, ordinance or otherwise, if it had the power to do so, but,

on the contrary, such rights of the public so conferred upon this defendant have at all times been held and retained by it; that in the exercise of its discretion, and in pursuance of said rights of the public, it became and was necessary and proper to purchase and obtain by condemnation proceedings water suitable and necessary to furnish said plant and supply, the said city and the inhabitants thereof, with water, as one of the necessary and proper steps in the exercise of said right on behalf of the
69 public, and that the actions and proceedings mentioned in said bill of complaint, were commenced and are now pending in said courts for said purpose, and that if defendant is enjoined from constructing and erecting said plant for the purpose aforesaid, and not permitted so to do, the objects, purposes and results of said actions so commenced and pending as aforesaid will be void and unavailing, on which account it will be compelled to abandon and discontinue said actions, and the jurisdiction theretofore acquired by said courts, substantially and effectively transferred to this court, contrary to the acts of Congress in such case provided.

And this defendant, further answering said bill of complaint, avers that the alleged contract and ordinance imposes an obligation upon said complainant to furnish water to said city and the inhabitants thereof for the period of twenty years, which said obligation is discharged by this defendant exercising the public rights aforesaid in the meantime, and which it neither expressly nor otherwise contracted or agreed not to do, and that the said obligation on the part of complainant herein was and is therefore conditioned that said city will not in the meantime construct and erect water works of its own, as it is now intending and seeking to do, as a public right and public duty, when so deemed by it expedient, the exercise of which constitutes the wrongs and grievances complained of.

Defendant therefore avers that the business functions of said city were only involved in said contract or ordinance, and that the
70 same did not include the relinquishment or surrender of the rights of the public, and duty of the defendant when it was in its judgment expedient to exercise the same, by constructing, operating and maintaining a water system or plant of its own, and that to the extent of any competition occasioned thereby said complainant is and will be relieved from its obligation to furnish and supply the inhabitants of said city with water, and that on account of the exercise of said right of the public, there can be and will be no taking of said complainant's property without due process of law, or any impairment of the obligation of its said contract, and that it is able to respond in damages for any wrongful or unlawful act or thing done or cause- to be done by it.

And this defendant further alleges and shows unto this honorable court that said complainant, and its predecessors in interest, and those in charge and conducting its said business, have wholly failed and neglected, and still fail and neglect to comply with the said alleged ordinance or contract in material and substantial requirements in this, to wit, in furnishing the said city and its inhabitants

with sufficient water and sufficient pressure, and in the quality thereof, and that said city has accepted said water, for and on account of having, during the time of said acceptance, no other course of supply, and for no other reason or purpose.

Wherefore, this defendant having fully answered, confessed, traversed, and avoided or denied all the matters in the said bill of complaint material to be answered, according to its best knowledge and belief, humbly pravs this honorable court to enter its judg-
71 ment that this defendant be hence dismissed with its reasonable costs and charges in this behalf, most wrongfully sustained; and for such further and other relief in the premises as to this honorable court may seem meet and in accordance with equity.

EDWARD HORSKY,
City Attorney for said City of Helena.

R. LEE WORD,
TOOLE & BACH,
Of Counsel for Defendant.

We hereby certify that in our opinion the foregoing plea is well founded in point of law.

EDWARD HORSKY,
City Attorney.
R. LEE WORD,
TOOLE & BACH,
Of Counsel for Defandant.

Service of copy made this 21st day of February, 1902.
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Answer. Filed and entered February 21, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

72 And thereafter, to wit, on the 20th day of June, 1902, a stipulation allowing amendment to bill was filed herein, which said stipulation is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
CITY OF HELENA, Defendant.
} No. 619.

Stipulation Allowing Amendment to Bill of Complaint.

It is hereby stipulated and agreed by and between the solicitors for the respective parties to the above-entitled cause that the bill of

complaint therein may be amended by the filing of an amendment thereto, a copy of which is hereto attached, and that for the purpose of making such amendment the replication heretofore filed may be withdrawn. It is further stipulated that the statements and allegations contained in said amendment shall, for the purpose of this suit, only be taken, considered and treated as true, and stand admitted the same as though specifically admitted by the
73 answer in said cause and that the said answer shall stand and be taken as an answer to said bill of complaint as amended.

Dated this 20th day of June, A. D. 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Complainant's Solicitors.
EDWARD HORSKY, *City Attorney.*
WORD & WORD AND
TOOLE & BACH,
Defendant's Solicitors.

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Complainant's Bill of Complaint Herein.

Now comes the complainant, and with the consent of the defendant, and by leave of court first had and obtained, files this its amendment to said bill of complaint, the same to be treated and considered as paragraph 9½ of said bill, and alleges:

74 9½. That heretofore and on the first day of July, 1889, the Helena Consolidated Water Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, made, executed, acknowledged, and delivered to the Boston Safe Deposit and Trust Company, as trustee, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, its certain mortgage or trust deed wherein and whereby there was granted, bargained, sold and conveyed to the said trustee all property of the said Helena Consolidated Water Company which it then owned or might thereafter acquire, as security for the payment of certain bonds and obligations of said water company thereafter to be issued in an amount not exceeding one million ($1,000,000) dollars; that on the 2d day of August, A. D. 1890, the said Helena Consolidated Water Company also made, executed and delivered to the said Boston Safe Deposit and Trust Company, as trustee, its certain other or supplemental mortgage or trust deed, wherein and whereby there was granted, bargained, sold and conveyed to the said Boston Safe Deposit and Trust Company, as trustee, to secure the payment

of the same indebtedness and bonds, all property, real, personal and mixed, then owned by it, including the water plant, system and supply by and through which it was then furnishing and supplying the said city of Helena and its inhabitants with water under and pursuant to the provisions of said ordinance No. 248, and also including all rights, privileges, and franchises granted and conferred by said ordinance and the contract therein contained; that the bonds of said water company, the payment of which was secured by said mortgages or trust deeds as aforesaid to the amount
75 of eight hundred and eighty-one thousand ($881,000) dollars, were issued and sold and were outstanding prior to January 1st, 1895; that thereafter and on the 2d day of December, 1896, a suit was commenced in the circuit court of the United States, ninth circuit, in and for the district of Montana, by the said Boston Safe Deposit and Trust Company, as trustee, against the Helena Consolidated Water Company, by the filing of a bill of complaint for the foreclosure of said mortgages or trust deeds, as aforesaid, and for the sale of the property described therein and the application of the proceeds of such sale to the payment and satisfaction of said bonds issued by said water company and then outstanding and unpaid, amounting in the aggregate to the sum of eight hundred and eighty-one thousand ($881,000) dollars; that in said suit so commenced the said Helena Consolidated Water Company appeared, and the court having jurisdiction of the parties and the subject matter, a decree was duly and regularly passed and entered on the 13th day of December, 1897, foreclosing said mortgages or trust deeds and authorizing and directing a sale of said property described therein; and that pursuant to such decree said property was sold as hereinafter more fully alleged and set forth.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Stipulation allowing amendment to bill. Filed June 20, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

76 And thereafter, to wit, on the 20th day of June, 1902, the following order was duly made and entered, which said order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
CITY OF HELENA. } No. 619.

Order Granting Leave to Amend Bill of Complaint, etc.

On motion of M. S. Gunn, Esq., of counsel for plaintiff, said plaintiff is hereby granted leave to amend its complaint herein by interlineation, by changing the letter and word "a," on page 3, line 7, to the word "said."

On filing of a stipulation herein plaintiff granted leave to file an amendment to bill of complaint, and said plaintiff granted leave to withdraw replication herein and refile the same in accordance with the stipulation as filed.

Done in open court, June 20th, 1902.

77 And thereafter, to-wit, on the 20th of June, 1902, amendment to bill of complaint was filed herein, which said amendment is entered of final record as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Complainant's Bill of Complaint Herein.

Now comes the complainant, and with the consent of the defendant, and by leave of court first had and obtained, files this its amendment to said bill of complaint, the same to be treated and considered as paragraph 9½ of said bill, and alleges:

9½. That heretofore and on the first day of July, 1889, the Helena Consolidated Water Company, a corporation organized and existing under and by virtue of the laws of the State of Montana, made, executed, acknowledged, and delivered to the Boston Safe Deposit and Trust Company, as trustee, a corporation organized and
78 existing under and by virtue of the laws of the State of Massachusetts, its certain mortgage or trust deed wherein and whereby there was granted, bargained, sold and conveyed to the said trustee all property of the said Helena Consolidated Water Company which it then owned or might thereafter acquire, as security for the payment of certain bonds and obligations of said

water company thereafter to be issued in an amount not exceeding one million ($1,000,000) dollars; that on the 2d day of August, A. D. 1890, the said Helena Consolidated Water Company also made, executed and delivered to the said Boston Safe Deposit and Trust Company, as trustee, its certain other or supplemental mortgage or trust deed, wherein and whereby there was granted, bargained, sold and conveyed to the said Boston Safe Deposit and Trust Company, as trustee, to secure the payment of the same indebtedness and bonds, all property, real, personal and mixed, then owned by it, including the water plant, system and supply by and through which it was then furnishing and supplying the said city of Helena, and its inhabitants with water under and pursuant to the provisions of said ordinance No. 248, and also including all rights, privileges and franchises granted and conferred by said ordinance and the contract therein contained; that the bonds of said water company, the payment of which was secured by said mortgages or trust deeds as aforesaid to the amount of eight hundred and eighty-one thousand ($881,000) dollars, were issued and sold and were outstanding prior to January 1st, 1895; that thereafter and on the 2d day of December, 1896,
79 a suit was commenced in the circuit court of the United States, ninth circuit, in and for the district of Montana, by the said Boston Safe Deposit and Trust Company, as trustee, against the Helena Consolidated Water Company, by the filing of a bill of complaint for the foreclosure of said mortgages or trust deeds, as aforesaid, and for the sale of the property described therein and the application of the proceeds of such sale to the payment and satisfaction of said bonds issued by said water company and then outstanding and unpaid, amounting in the aggregate to the sum of eight hundred and eighty-one thousand ($881,000) dollars; that in said suit so commenced the said Helena Consolidated Water Company appeared, and the court having jurisdiction of the parties and the subject-matter, a decree was duly and regularly passed and entered on the 13th day of December, 1897, foreclosing said mortgage or trust deeds and authorizing and directing a sale of said property described therein; and that pursuant to such decree said property was sold as hereinafter more fully alleged and set forth.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Amendment to bill of complaint. Filed June 20, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

80 And thereafter, to-wit, on the 20th day of June, 1902, a replication was filed herein, which said replication is entered of ffnal record as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Replication.

This replicant, The Helena Water Works Company, saving and reserving to itself all and all manner of advantages of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the defendant, The City of Helena, for replication thereunto saith that it doth and will aver, maintain and prove its said bill to be true, certain and sufficient in the law to be answered unto by the said defendant, and that the answer of the said defendant is very uncertain, evasive and insufficient in law to be replied unto by this replicant; without that, that any other matter or thing in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, trav-
81 ersed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors and of Counsel for Complainant.

(Endorsed:) Title of court and cause. Replication. Filed and entered June 20th, 1902. Geo. W. Sproule, clerk.

And thereafter, to wit, on the 30th day of June, 1902, a stipulation was filed which said stipulation is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Stipulation as to Agreed Statement of Facts.

It is hereby stipulated and agreed by and between the parties to the above-entitled suit, that the original papers referred to in
82 the "Agreed statement of facts" herein, may be used upon the trial, instead of the copies therein mentioned; and that

in case of appeal by either party, that the said copies may be inserted as required by said "Agreed statement of facts."

Dated June 28th, 1902.

CARPENTER & CARPENTER, AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Stipulation filed and entered June 30, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

And thereafter, to wit, on the 30th day of June, 1902, the agreement upon facts was filed herein, which said agreement is entered of final record as follows, to wit:

83 In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Agreement upon Facts.

It is hereby stipulated and agreed between the parties to the above-entitled suit, that the following statement of facts may be, and the same are hereby made the facts upon which the trial and determination of all of the questions and issues of law and facts shall be had and a final decree thereupon entered, and that the same may be adopted by said court as its findings herein for that and all purposes of said suit.

It is further stipulated and agreed that the facts herein agreed upon are limited and confined to this suit alone, and shall not be deemed as admissions upon the part of either party for any other purpose than as hereinabove set forth; and that no legal deductions set forth in said bill of complaint shall be deemed admitted.

It is agreed that each and all the allegations contained in complainant's bill of complaint as amended up to and including paragraph XX, are true and correct, except in so far as any legal
84 deductions are stated and made therefrom; and the further fact that in the purchase of Beaver Creek water the warrants issued in payment thereof have been paid, and said warrants were issued in exchange by said city for, and the deeds of conveyance for said waters were delivered to said city upon receipt of, said warrants, and that immediately after receiving said warrants, and de-

livering said deeds as aforesaid, said warrants were presented to the city treasurer on said 3d day of April, 1901, and immediately thereupon said city treasurer paid said warrants out of the cash on hand in the city treasury of said city derived from taxes levied and collected for general municipal and administrative purposes, and that it is now the legal owner and holder of the water so purchased.

II.

It is agreed that in the month of January, 1895, the defendant commenced the action and proceedings mentioned in paragraph XXI, of complainant's bill of complaint; and that in such action and proceedings it was finally adjudged and determined as shown and disclosed by the pleadings therein, the judgment thereupon entered, and the opinion of the court, all of which is made a part of this agreed statement of facts, and are hereto attached; and that said judgment is in full force and unreversed.

III.

That the indebtedness of the defendant is now and has been for several years last past, in excess of three per cent. (3 %) of the assessed value of all the taxable property in said city, as determined by the assessment for the State and county taxes during each and
85 all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars ($486,000), and that the value of the taxable property during all of said times in said city, as determined by the assessment for the State and county taxes for each of said years, does not and has not exceeded the sum of thirteen million ($13,000,000) dollars, and that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a water plant, water system and water supply to be owned and controlled by said city, has been submitted to the qualified electors thereof; and that no other election upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

IV.

That said defendant, The City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant except as hereinafter stated in paragraphs VIII, and as follows:

That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the "Helena Daily Independent,"
86 a daily newspaper of general circulation in said city and State; and in the "American Contractor," a weekly publication of general circulation in the city of Chicago, State of

Illinois, and throughout the United States, for sealed proposals for the "construction and purchase of a water plant and supply," in accordance with certain plans and specifications theretofore adopted by said city council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: "It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a place different from that herein specified; but any such company or individual may submit any bid that it or he may desire, upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received." And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly & Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand ($990,000) dollars. That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to wit, November 6, 1899, the limit of indebtedness over and above the three per cent. (3%) limit fixed by the constitution had not yet been extended, and that thereafter, to wit, at an election of the taxpayers affected thereby, or said city of Helena held
87 on the 4th day of December, 1899, pursuant to an ordinance in that behalf duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent. (10%) over and above said three per cent. (3%) limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city theretofore for State and county taxes being the sum of ten million, seven hundred and forty thousand ($10,740,000) dollars; but that the majority of the taxpayers affected thereby, voting at said election voted "No," and against said proposed extension of 10 per cent. (10%), and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby of said city, voted "Yes," and in favor of extending the limit of indebtedness of said city five per centum (5%), or in amount six hundred, fourteen thousand four hundred and seventy-five dollars and fifty cents ($614,475.50), over and above the three per cent. (3%) limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter on the 4th day of June,
88 1900, by ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date,

said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum (5%) over and above the three per cent. (3%) limit, provided by section 6 of article XIII, of the constitution of the State of Montana, of the total assessed valuation of the taxable property of said city as ascertained by the last assessment theretofore for the State and county taxes, to wit, five per cent. (5%) of $12,287,510; namely, $614,475.50 over and above said limit of three per cent. (3%), for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter, said defendant in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals, in the said "Helena Daily Independent," for a "water supply," and also for a "water supply and system" to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city; said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein, or by said defendant received from complainant in response thereto.

89

V.

That the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the City of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear creeks.

VI.

That the ordinances Nos. 467 and 483, mentioned in paragraph XXVII of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, The City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose as hereinbefore stated, and will engage in furnishing the said defendant, The City of Helena and its inhabitants with water suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property as stated in paragraph XXVIII of the complaint; but that no injury of which complainant can

complain will result therefrom if defendant city has the rights claimed by it.

90 VII.

That the facts stated in paragraphs XXIX, XXX and XXXI of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena.

VIII.

It is also agreed that — an election held at said city on the 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a supply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecesor in interest of complainant, commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke,

91 by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint, defendant, The City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the supreme court of the State, and by that court the said judgment so appealed from, was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreserved, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the supreme court *are* hereto attached and admitted with all the force and effect to which the same may be and are entitled.

IX.

That said defendant, City of Helena, has made no other efforts under the allegations of paragraph XXIV of said complaint than as herein set forth, and that it proposes and intends to construct and establish a water plant and system to be owned and possessed by it

prior to the expiration of the alleged contract and franchise of complainant, at such time as in its judgment and discretion it is feasible and proper so to do; and all actions and proceedings necessary therefor instituted and maintained; and that unless enjoined and restrained from so doing, it will, both before and after the expiration of said alleged contract and franchise, furnish and supply
92 the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made.

X.

And it is further agreed that said ordinance No. 248, is in full force and effect except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid.

XI.

And it is also further agreed that all the allegations in the said complainant's bill of complaint, alleged and not denied in the answer of defendant, be, and the same are, admitted as agreed facts, save and except the legal inferences and conclusions drawn therefrom by the pleader; and that all denials inconsistent with the facts herein agreed upon be, and the same are, hereby withdrawn; and said pleadings are made and construed to conform to the facts herein agreed upon.

93 Dated at Helena, Montana, this 28th day of June, A. *A.* 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

The words "Helena Consolidated Water Company, predecessor in interest of complainant" were inserted on page 7 before signing.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for Complainant.
EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Agreement upon facts. Filed and entered June 30th, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

94 And thereafter, to wit, on the 20th day of August, 1902, an order was duly made and entered, which said order is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY
vs.
CITY OF HELENA. } No. 619.

Order Allowing Papers to be Annexed to Agreement upon Facts.

On motion of Edward Horsky, Esq., attorney for defendant, and with consent of counsel for complainant, it is ordered that the following papers may be annexed to and made a part of the agreed statement of facts on file herein *nunc pro tunc* as of June 30th, A. D. 1902; *i. e.*, notice of appeal, order, injunction, complaint, and opinion in the case Helena Consolidated Water Company *vs.* Wm. L. Steele *et al.*, and judgment-roll in the case of State of Montana *ex rel.* etc. *vs.* Helena Consolidated Water Company.

Done in open court, August 20th, 1902.

95 And thereafter, to wit, on the 20th day of August, 1902, in accordance with an order of August 20th, 1902, the following papers were annexed to and made a part of the agreed statement of facts and filed *nunc pro tunc* as of the 30th day of June, 1902, and entered of final record as follows, to wit:

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Notice of Appeal.

96 Please take notice that the defendants named in the above-entitled action hereby appeal to the supreme court of this State from the order granting an injunction therein made

and entered in the said district court on the 26th day of February, A. D. 1896, in favor of the plaintiff in said action and against said defendants, and from the whole thereof.

MESSENA BULLARD,
G. H. AND S. H. McINTIRE,
TOOLE & WALLACE,
Attorneys for Defendants.

Dated Helena, Montana, February 28th, 1896.

To the clerk of said district court, and to B. P. Carpenter, Esq., and Messrs. McConnell, Clayberg & Gunn, attorneys for plaintiff.

Service of the foregoing notice of appeal upon us this 28th day of February, A. D. 1896, is hereby admitted.

McCONNELL, CLAYBERG & GUNN,
B. P. CARPENTER,
Attorneys for Plaintiff.

97 STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

OFFICE OF THE SHERIFF.

I hereby certify that I received the annexed order on the 14th day of December, A. D. 1895, and personally served the same on the 14th and 17th day of December, A. D. 1895, upon William L. Steele, mayor of the city of Helena, (Dec. 17th), the City of Helena, by William L. Steele, mayor (Dec. 17th), Messena Bullard, city clerk of the city of Helena (Dec. 14th), by delivering to William L. Steele, mayor of the city of Helena, Massena Bullard, city clerk, personally, in the county of Lewis and Clarke, a copy of said order at the same time showing them the annexed original order and informing them of the contents thereof.

Dated Helena, Montana, December 20th, 1895.

J. H. JURGENS, *Sheriff,*
By C. H. MARTIEN,
Deputy Sheriff.

Service, $3.00.

98 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA BULLARD, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Order to Show Cause.

99 On the complaint of the plaintiff, duly verified and upon the affidavit of William A. Chessman, a copy of which is hereto attached, it is ordered that the defendants show cause before me, or before this court, at the city of Helena, on the 21st day of December, 1895, why an injunction should not be issued restraining them, and each of them, from advertising, or causing to be published a certain notice for bids for a water plant to be owned and operated by the city of Helena, and for such other and further relief as may be just.

And it is further ordered that the said defendants, and each of them, and their, and each of their, agents, servants and employees, be in the meantime restrained, and they and the said defendants, and each of them, and their, and each of their, agents, servants and employees, are hereby forbidden to suffer or commit any of said acts until the further order of this court, conditioned upon filing an undertaking in the sum of $500.

Dated December 14th, A. D. 1895.

HENRY N. BLAKE, *Judge.*

100 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,
vs.
WILLIAM L. STEELE, Mayor of the City of Helena, ET AL., Defendants.

Injunction.

On return of the order to show cause made by this court on the 14th day of December, 1895, and returnable on the 21st day of December, 1895, and by consent of the parties adjourned from time to

time until this 26th day of February, 1896; after hearing counsel for the plaintiff and their proofs and evidence and after hearing counsel for defendants and their offers of proof, and no sufficient cause to the contrary being shown;

It is ordered that said order to show cause be, and the same is, hereby made absolute, on the said plaintiff executing and filing a written undertaking pursuant to the statute and the practice
101 of the court, to the effect that it will pay the said defendants such damages, not exceeding the sum of five hundred dollars ($500), as they may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto; and

It is further ordered that the defendants, and each of them, and their, and each of their, agents, servants, employees and attorneys, be, and they are hereby, enjoined from advertising, or causing to be published, any notice or advertisement calling for bids for a water plant, to be owned and operated by the city of Helena, and that said defendants, and each of them, and their, and each of their, agents, servants, employees and attorneys be enjoined and restrained from carrying out that certain resolution of the city council of the city of Helena passed on the 10th day of December, 1895, which was as follows: "That we now proceded to advertise for bids for a water supply to be owned and operated by the city of Helena."

Dated in open court this 26th day of February, A. D. 1896.

HENRY N. BLAKE, *Judge.*

102 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,

vs.

WILLIAM L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Complaint.

Now comes the plaintiff, and for cause of action against said defendants alleges:

I. That it is now, and at all times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana.

103 II. That the defendant, The City of Helena, is now, and at all times hereinafter stated was, a municipal corporation,

duly organized and existing under and by virtue of the laws of the State of Montana.

III. That the defendants, William L. Steele and Massena Bullard, are now respectively the duly qualified and acting mayor and city clerk of the city of Helena.

IV. That John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fisher, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, Jacob L. Walker are now the duly elected, qualified and acting members of the city council of the city of Helena.

V. That this plaintiff is a taxpayer of the city of Helena and files this bill in its behalf as such taxpayer, and in behalf of all other taxpayers of the city of Helena similarly situated; and this plaintiff also brings this action in its own behalf as the owner of a water supply and water system in the city of Helena, which will be irreparably damaged and injured by the action of the defendants hereinafter alleged. That the indebtedness of said city of Helena *is* now exceeds, and at the time of the adoption of said specifications and at the time of the directing of said advertisement, exceeded the sum of three per cent. upon the assessed valuation of all property within the limits of said city property taxable as provided in the constitution of the State of Montana.

VI. That pursuant to the provisions of section 6 of article
104 XIII of the constitution of the State of Montana, and subdivision 64 of section 4800 of the Political Code of the State of Montana, the taxpayers affected thereby, by vote duly cast at an election regularly and legally held for that purpose on the 29th day of July, A. D. 1895, authorized and directed the city council to proceed to acquire its own water system and supply, and to issue bonds in payment thereof.

VII. That pursuant to ordinance numbered 95 of the city of Helena, a true copy of which ordinance is hereto attached, marked Exhibit "A," and made a part of this complaint, entitled, "Granting the use of the streets to George F. Woolston for the purpose of laying and operating water mains," duly passed and enacted by the city council of the city of Helena, and approved on the 13th day of February, 1887, and in pursuance of ordinance numbered 248, of the ordinances of the city of Helena, entitled, "To provide the city of Helena and its inhabitants with a permanent water supply," duly passed and enacted by the city council of the city of Helena and approved on the 15th day of January, 1890, a true copy of which ordinance is hereto attached, marked Exhibit "B," and made a part of this complaint, the plaintiff and its predecessors in interest proceeded in good faith to establish and maintain, and for over five years last past has in good faith established and maintained a system of water supply in said city, through and by means of which it has for over five years last past furnished the city of Helena and the inhabitants thereof with an ample supply of pure and
105 wholesome water; that it is now maintaining such water supply, and is furnishing water as aforesaid to said city and its

inhabitants; that under and by virtue of the terms of said ordinance this plaintiff and its predecessors in interest were granted the franchise and right of laying its water mains throughout the streets, alleys and public places of the city of Helena, and to furnish water to said city and its inhabitants through the same; and that the franchise granted by said ordinance numbered 248, will continue in force, before its expiration, over fourteen years from this date.

VIII. That no other corporation, person or party has established or maintained any water system in said city, and there is not now in said city any other water system or supply for the purpose of supplying said city of Helena and its inhabitants with water than plaintiff's.

IX. That immediately after the determination of the election hereinabove referred to, it became and was the duty of the city council of the city of Helena to notify this plaintiff by the passage of an ordinance of its desire to purchase plaintiff's water system; that, although many months have passed since the determination of the result of said election, whereby it became the duty of said city council to pass the ordinance above referred to, the said city council has passed no ordinance notifying this plaintiff of the desire of said city to purchase plaintiff's water system, and has not in any way or manner notified this plaintiff of such desire, and has taken no steps or action in that regard, and utterly neglects,
106 fails, and refuses so to do; but, on the contrary, said city council of the city of Helena, by resolution heretofore adopted, has directed the city clerk of said city to advertise for bids for the construction and sale to the city of a complete water system, which advertisement is to continue for a period of sixty days and be published in newspapers published in the city of Helena, and in some newspaper published in the city of New York, in direct violation of the statutes of the State of Montana, and in violation of the rights of this plaintiff, not only as a taxpayer, but as the owner of said water system so established and maintained in said city.

X. That the advertisement so directed to be made by said city council is to be made upon the plans and specifications heretofore adopted by said city council, a true copy of which is hereto attached and marked Exhibit "C," and made a part of this complaint.

XI. That said resolution so passed by said city council determining to so advertise, is without any authority of law, and is beyond the power of said city council, and by such advertisement and the payment therefor it will misappropriate and divert a large amount of the trust funds of the city of Helena, or create a large liability, which can only be liquidated by the use of funds raised by said city by taxation in the past, or to be raised by said city by taxation in the future; and that this plaintiff, as a taxpayer of said city, is directly injured by such illegal act of said council; that said city threatens to so advertise immediately, and will do so unless restrained by this court.

107 XII. That under and by virtue of the laws of the State of Montana, said city has no power, right or authority to pur-

chase, own or control any water system or water supply, save and except that now owned and maintained by the plaintiff herein.

XIII. That said city, acting by and through its council and other officers, threatens to enter into a contract to purchase a water supply and system other than that owned by the plaintiff, pursuant to the terms of said advertisement so about to be made; that it threatens and will, unless restrained by this court, receive and accept a proposition or propositions to enter into a contract or contracts with the maker or makers of such proposition or propositions, to purchase a water supply or water system, in violation of the laws of the State of Montana, to the injury of this plaintiff as a taxpayer and to the great and irreparable injury and damage of its property.

XIV. That the plans and specifications so adopted by the said city council were prepared and adopted fraudulently and for the express purpose of preventing this plaintiff from making any bids thereunder or competing with any other person or corporation in a sale of a water supply to the city, and for the express purpose of preventing said city from purchasing the plant, system and water supply of this plaintiff and for the express purpose of enabling said city to cause to be constructed, and to purchase a water supply other than that owned by the plaintiff herein.

XV. That the plaintiff herein cannot become a bidder under said advertisement so threatened to be made, and cannot compete
108 upon said bids, for the reason that plaintiff's plant and system does not comply with the said plans and specifications so adopted by said city council.

XVI. That said plans and specifications are such that there can be no competition at said bidding, and that it would be impossible for the city to accept the lowest responsible bid.

XVII. That said advertisement is but a preliminary step taken by said defendants, and that it is the purpose and intention of said defendants to cause to be constructed and purchase a water system and supply other than that owned by this plaintiff; and that it will, unless restrained and enjoined by this court, proceed with the different steps to that end and eventually illegally issue a large amount of the bonds of said city in payment therefor.

XVIII. That all and singular the acts and threatened and intended acts of said defendants are without authority of law whatsoever, are illegal, and will cause great and irreparable injury to this plaintiff and its property.

XIX. That plaintiff has no plain, speedy or adequate remedy at law, but can only obtain relief in a court of equity.

Wherefore plaintiff prays that said defendants and each and all of them may be, by order of this court, restrained and enjoined from advertising for bids for a supply of water for the city of Helena and its inhabitants, and that plaintiff may have such other
109 and further relief as to the court may seem just, and that it recover its costs in this action.

B. P. CARPENTER AND
McCONNELL, CLAYBERG & GUNN.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

William A. Chessman, being duly sworn on his oath, says: That he is an officer of the above-named plaintiff, to wit, its president, and makes this verification for and in its behalf; that he has heard read the foregoing complaint, and that the matters and things therein stated are true of his own knowledge except as to such matters and things as are therein stated to be on information and belief, and as to such matters he believes it to be true.

WM. A. CHESSMAN.

Subscribed and sworn to before me this 14th day of December, A. D. 1895.

JNO. B. CLAYBERG,
Notary Public in and for the County of Lewis & Clarke, State of Montana.

EXHIBIT "A."

Ordinance No. 95.

Granting the use of the streets to George F. Woolston for the purpose of laying and operating water mains.

SECTION 1. From and after the date of the passage of this ordinance, and until the complete expiration of twenty years,
110 George F. Woolston and his successors and assigns, shall have, and they are hereby granted the license and privilege of laying water mains and pipes in any and all of the avenues, streets and alleys, public grounds and thoroughfares of the city of Helena, for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, established, maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city and to said city if required; provided, however, that nothing herein contained shall be so construed as to give to said George F. Woolston or his successor or assigns, the exclusive right or privilege of occupying said streets, avenues, alleys, public grounds and thoroughfares of said city with water mains or pipes, or the exclusive right of conveying, distributing and selling water throughout the city, or of furnishing the same to said city.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said

George F. Woolston, and to his successors and assigns the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thor-
111 oughfares in the said city, provided that he or they shall without reasonable delay, restore the same to as good condition as they were before such excavations were made, and remove all sand, earth, rubbish or other material.

SEC. 3. The said George F. Woolston, and his successors and assigns, shall at all times during the period of twenty years to which the license and privilege granted by this ordinance is limited, provide a full and sufficient supply of water for the use and wants of the inhabitants of the said city for fire, sewerage and other purposes in case said city shall hereafter desire the same. Said water shall be pure and wholesome and free from animal, vegetable or mineral substances, that would render it unhealthful or unfit for domestic use. He or they shall not convey or distribute any water from the sources of the present supply of the said city, except by permission of a three-quarter vote of the city council, at a regular meeting after due notice of one month previous.

SEC. 4. The pressure in mains and pipes at the level of the first floor of the courthouse, now in progress of erection in said city and at all other points of equal height shall be maintained at not less than sixty pounds to the square inch, if reservoir works shall be used, and if a direct pressure system shall be used, sixty pounds to the square inch for pressure, and twenty-five to forty pounds to the square inch ordinary pressure, shall be maintained at this point and all others of equal height.

112 SEC. 5. That said George F. Woolston or his successor or assigns, shall lay thirteen and one-half miles of mains within the limits of said city, exclusive of the main or mains connecting his proposed works with the point or points of distribution, and such mains shall be of the following sizes, on the following streets respectively; at least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railway Company; on Broadway from Main street to Rodney street. At least eight inches in diameter on Madison avenue from Lawrence street to Davis street, in the Hauser addition; on Lawrence street from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter, on Benton avenue from Edwards street to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Floweree street; on Lawrence street from Madison street to the western boundary of the townsite; on Clarke street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams street to Ming street; on Ming street from Jefferson street to Howey street; on Bridge street from Clore

street to Chaucer street; on West Main street from Bridge street south 1,090 feet: on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to
113 Ewing street from Bridge street to Broadway; on Ewing street from Bridge street to Broadway; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Teijen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue east 600 feet; on Third street, Northern Pacific addition; from Helena avenue north 500 feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue, on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway. At least four inches in inner diameter on Dearborn street from Lawrence street to Davis street, in Hauser addition; on Cutler street on West Main street to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckinridge street from Rodney street to Beattie street; on Eighth avenue from Rodney street to Hoback street from Elizabeth avenue to Pflaume street. At least three inches in inner diameter on Davis street in Hauser addition, from Madison avenue to Benton avenue; on Strawberry street from Clark street to Lawrence street; on Adams street from Howey street to Jefferson street; on Beattie street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

SEC. 6. The said George F. Woolston, or his successors or
114 assigns, shall place upon and connect with the thirteen and one-half miles of mains herein provided for, at points to be hereinafter designated by the city council of the said city, one hundred and fifty hydrants and shall maintain said hydrants during the continuance of this ordinance. Such hydrants shall have double nozzels, and shall be nonfreezing and of the latest and most approved pattern.

SEC. 7. The said George F. Woolston, and his successors and assigns are hereby required to lay and maintain in addition to the thirteen and one-half miles of mains hereinbefore provided for, such mains, of such sizes at such times and upon such streets, as the city council of said city shall from time to time direct, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of a diameter of six inches or more, or if the same shall be of a diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hydrants to be of the pattern hereinbefore described.

SEC. 8. All mains and pipes shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets, and all repairs and extensions of such mains and

pipes shall be under the supervision of the said street commissioner as to grade and locations in streets.

SEC. 9. It is hereby provided that in no case shall the mains or pipes to be laid and maintained under the provisions of this ordinance, in any manner interfere with the mains or pipes
115 legally laid in said streets so as to injure or obstruct the same, or the use thereof, nor shall such mains or pipes interfere or obstruct any sewer now existing in said streets nor shall there be any interference with any mains, pipes or sewers which may be hereafter authorized laid or constructed, by or under the authority of the said city of Helena, by mains laid hereafter by the said George F. Woolston, or his successors or assigns; and at all places and points in the said city; where said water mains and pipes approach gas mains or pipes, there shall be at least six inches of earth between the same.

SEC. 10. No water shall be conveyed to or distributed throughout said city in wooden conduits or open ditches and all mains and pipes and all material used in laying and repairing the same shall be new and first class in all respects and all mains and pipes shall stand a pressure of not less than four hundred pounds to the square inch.

SEC. 11. All water which may be required by said City of Helena, for the use of any and all buildings owned or occupied by said city for municipal purposes, shall be furnished by the said George F. Woolston, his successor or assigns, without cost or charge to the said city.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to said George F. Woolston, or his successor or assign to repair the damages, but he or they shall receive no pay from any person or corporation for any time during which they shall fail to furnish water from the causes in this section stated.

116 SEC. 13. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the rights and property of others, and any damage resulting from said works, or the erection, construction and operation thereof shall be repaired and paid for by the said George F. Woolston or his successors or assigns.

SEC. 14. The said George F. Woolston, his successors and assigns shall begin work within the city of Helena on the plant herein contemplated not later than the first day of June, 1887, and the system shall be completed and in readiness for the conveyance and distribution of water throughout the thirteen and one-half miles of mains hereinbefore provided for, before the thirty-first day of December, 1887, unless the same shall be prevented by unforeseen and unavoidable causes, in which case the time shall be extended for a time equal to the period lost by such detention; but in any event the system shall be completed and in operation by the first day of October, 1888.

SEC. 15. The charges for water furnished to any persons, bodies

or corporations in this city, shall not exceed the following rates: For private houses of four rooms or less, 85 cents per month, for private houses with more than four rooms, $1 per month; for each private bathtub, 33 cents per month. For each private water basin 25 cents per month. For each private water-closet 33 cents per month. For each private urinal, 33 cents per month. For irrigating lawns and grounds for each lot having fifty feet front or less, where other water is taken, eight dollars per year, or one
117 dollar per month for the months of May, June, July, August and September; where no other water is taken, twelve dollars per year, or one dollar and fifty cents per month for said months of May, June, July, August, and September; for each additional twenty-five feet front, twenty-five cents per month and a proportionate rate for fractions of twenty-five foot front. Any person, body or corporation applying for the same shall be entitled to purchase and place upon his or their service pipe a water meter, at his or their own cost or expense. Whenever any consumer of water is using the same wastefully, the said George F. Woolston or his successors or assigns may be also entitled to place a meter upon the service pipe of such consumer, at his or their own proper cost or expense, and charge meter rates for the water used. Where meters are used the charges shall not exceed the following rates, viz.: for 1,000 gallons per day, or less, 3 cents per 100 gallons; for 1,000 to 4,000 per day, 2½ cents per 100 gallons; for 4,000 gallons per day or more, 2 cents per 100 gallons. For manufacturing and other purposes, not provided for in this section, the said George F. Woolston, his successors or assigns, shall make special rates, but in no case shall the same be in excess proportionately, to the rates herein prescribed.

SEC. 16. The said George F. Woolston, and his successors and assigns, shall make no charge for tapping mains for the connection of service pipes, therewith and such connections shall be made at the cost of the applicant, by any plumber whom he may employ, but if any plumber fails to make such connections in a work-
118 manlike manner, or to restore the street to as good condition as it was before, he shall be liable in damages to the said George F. Woolston, or his successor or assigns, or to any other person or corporation injured thereby. In all cases, however, a permit must be had from said George F. Woolston or his successors or assigns. All service pipes shall be laid at least five feet below the surface.

SEC. 17. The said George F. Woolston and his successors and assigns shall have the right to put a stop-cock on each service pipe below the sidewalk near the curb at his or their own proper cost and expense, and shall box the same securely, placing the cover flush with the sidewalk. He or they may turn off the water from any premises when the water rates are not paid within a reasonable time, after the same shall have become due.

SEC. 18. In case the city council of said city shall during the continuance of this ordinance, purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other

purposes, said city council shall have power to govern by ordinances to be enacted from time to time, the general use of all hydrants which this ordinance requires said George F. Woolston and his successors and assigns to erect and maintain, and such control and care thereof as may be necessary to a full beneficial use of the same and the water through them for fire and sewerage purposes during the continuance of such contract of purchase, but such government, use, control and care thereof, shall not be unreasonable or in any
119 way interfere with any of the rights or contracts of said George F. Woolston or his successors or assigns, in case George F. Woolston, his successors or assigns fail to keep said hydrants in good repair, the said city council may repair the same, and deduct the amount thereof from the first payment thereafter to be made to George F. Woolston, his successors or assigns, for water furnished under such contracts.

SEC. 19. The said City of Helena expressly reserves the right to license and grant charters to other persons and companies to convey, distribute and sell water within said city to private consumers, now, however, in violation of this ordinance. The right is also expressly reserved by said city to enter into contracts with and purchase water for fire, sewerage and other purposes from other persons or corporations.

SEC. 20. The mayor and committee of the city council of said city, and any officer or other person authorized by said council, shall, at all times have free access to the entire works and system contemplated by this ordinance, for the purpose of inspecting, examining and testing the same, or any part or portion thereof.

SEC. 21. In case the city council of said city shall, during the continuance of this ordinance, purchase water from said George F. Woolston, his successors or assigns, for fire, sewerage and other purposes, the said city council shall have power in case of fire, to cause all service pipes to be disconnected and the use of water by all private parties to be disconnected for such time as the fire may continue, or the exigencies of the occasion demand.

120 SEC. 22. It is hereby expressly provided, that if at any time during the period of twenty years herein mentioned, the said George F. Woolston, his successors or assigns, shall in any manner fail to comply with all the terms of this ordinance, the city council of said city shall have the right, and such power is hereby reserved, to amend, modify or repeal this ordinance; provided, that such power, or right shall not deprive said George F. Woolston, his successors or assigns, of the franchise of maintaining water mains in said streets, and the right to sell and furnish water to the inhabitants of said city, during said twenty years, under such regulations as the city council may adopt. Provided, that in no case shall the rates charged for water, exceed those mentioned herein, nor shall the city council reduce the rates of water below those herein mentioned, during the twenty years for which this charter is granted.

SEC. 23. When the said George F. Woolston or his successors or

assigns, shall have completed the system hereby contemplated, he or they shall notify the city council of said city of such completion, whereupon said city council shall within ten days examine, inspect and test said system, and works, and if found to be in compliance with this ordinance, accept the same. Such test so far as fire streams are concerned shall be made by forcing six one and one-quarter inch streams through 100 feet of hose, each, at one and the same time under the pressure herein provided.

SEC. 24. Any person, except those who are authorized by the said George F. Woolston, or his successors or assigns, or by the
121 city council of said city, who hall in anyway disturb, interfere or meddle with any main, hydrant, connection, service pipe, fountain, reservoir, well, building, machinery, or any property of, or belonging to said George F. Woolston, or his successors or assigns, or by any means pollute or defile any reservoir, well, spring, or source of water supply, or any hydrant, fountain or receptacle receiving water from said works within the limits of said city, shall be deemed guilty of a violation of this ordinance.

SEC. 25. In case the city council of said city shall hereafter during the continuance of this ordinance purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, and a fire occurs, any person who shall attempt to hold possession of any of the hydrants which under this ordinance said George F. Woolston, or his successors or assigns are required to erect and maintain or who, having a key to any such hydrant, in his possession or under his control, shall refuse to turn over or furnish said key to any person duly authorized by said city council and permit to be turned on, or refuse to turn over said key and permit the water to be turned off at the proper time, shall be deemed guilty of a violation of this ordinance.

SEC. 26. Any person violating any of the provisions of this ordinance shall, on conviction before the police magistrate of said city, be punished by a fine of not less than five dollars, and not more that fifty dollars, or by imprisonment in the city jail for a period of not less than ten days nor more than ninety days.

SEC. 27. Wherever the word "streets" is used in this
122 ordinance, it shall be construed to mean streets, alleys, avenues, public grounds and thoroughfares.

SEC. 28. No provision contained in this ordinance respecting the size of the mains or pipes or of the pressure to be maintained, shall be construed to release or abate the obligation of the said George F. Woolston, and his successors and assigns, to furnish at all times a full and sufficient supply of water for the use of the inhabitants of said city, or for the use of said city for fire, sewerage and other purposes, in case the city council of said city, shall hereafter conclude to purchase water of said George F. Woolston, or his successors or assigns for such purposes. But the said George F. Woolston, or his successors or assigns shall not be required to furnish water at such points of such height that the pressure required at points herein mentioned will not deliver the supply.

SEC. 29. It is hereby declared to be the true intent and meaning and purpose of this ordinance, to provide the inhabitants of said city with an ample supply of water for domestic, manufacturing and other purposes and to provide an ample supply of water in said city so that if the city council of said city shall hereafter deem it necessary to purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, the same can be furnished.

SEC. 30. If the city council of the said city shall hereafter desire to purchase water from said George F. Woolston, or his successors or assigns, for fire, sewerage and other purposes, the said George F. Woolston, or his successors or assigns, shall provide and de-
123 liver the same at a cost to the said city not to exceed one hundred dollars per year per hydrant for the water delivered through the first one hundred and fifty hydrants herein provided for, and sixty-five dollars per year per hydrant for the water delivered through any additional hydrants erected and maintained by order of the said city council.

SEC. 31. In case the city council of said city shall at any time during the continuance of this ordinance, deem it for the best interests of said city, to purchase water from said George F. Woolston, his sucessors or assigns, for fire, sewerage and other purposes, the same shall be furnished by the said George F. Woolston, his successors or assigns under contracts to be hereafter made, upon terms to be hereafter agreed upon between the said city and George F. Woolston, his successors or assigns.

SEC. 32. Within sixty days after this ordinance shall become operative the said George F. Woolston, his successors or assigns shall file with the city clerk of said city, an acceptance in writing of all the terms, conditions and provisions, or this ordinance, which acceptance, shall be duly recorded in the official records of said city.

SEC. 33. It is not the intention of this ordinance to deprive George F. Woolston, his successors or assigns, of any right which he, or they may have under ordinance No. 93, as passed by the city council November 20th, 1886.

Approved February 13, 1887.

124 EXHIBIT "B."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena, did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent," for a period of forty days, to wit, from the 13th day of June, 1889, to the 1st day of August, 1889, with specifications, for

proposals for a water supply for the use of said city and the inhabitants thereof; and,

Whereas, it was found and determined upon an examination of the several proposals received in response to such advertisement, and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of said George F. Woolston; and,

Whereas, the city council of said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor;

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of
125 Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company or its successors or assigns, the exclusive right of occupying the streets, avenues, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other materials.

126 SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of He-

lena from regrading or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations whomsoever, so long as such franchises, rights and easements do not interfere with the franchise, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations to whom such franchises, rights or easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the
127 said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes be laid and maintained, under the provisions of this ordinance, in any manner — interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said City of Helena, by mains hereafter laid by the said Helena Consolidated Water Company, or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

128 SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the

square inch ordinary pressure shall be maintained at said points, and all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay, or provide at its own cost and expense, twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes and on the following streets in the said city of Helena, respectively: At least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway, to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street; at least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge
129 street to Benton avenue at Floweree street; on Lawrence street from Madison avenue to the western boundary of the city; on Clark street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howie street; on Bridge street from Clore street to Chaucer street; on West Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Tietjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue; on Third street, Northern Pacific addition, from Helena avenue north 500 feet; on Grand street from *from* Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge to Broadway; at least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street; on Pine street from Joliet street to Rodney street; on Water street from Cutler street south 430 feet; on Breckenridge street to Beattie street; on Eighth avenue; from Eighth
130 avenue to Hoback street; on Eleventh avenue from Rodney street to Hoback street; on Hoback street from Eleventh ave- to Pflaume street; at least three inches in inner diameter on Davis street in Hauser addition, from Madison avenue to Benton avenue, on Strawberry street from Clark street to Lawrence; on Adams street; from Howie street to Jefferson street; on Davis street from Broadway

to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains, the said Helena Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains or pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the said said city council of said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the
131 mains shall be not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city, and formerly belonging to the Helena Water Company, such hydrants need not be changed or removed, and said council shall not change or relocate the same, but such hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon streets as the city council shall from time to time direct, which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city
132 for municipal purposes, and also all water necessary for street sprinkling purposes in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must

be taken from the mains of the said Helena Consolidated Water Company by means of stand pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines of mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the first day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of in-
133 specting and examining, or testing the same, or any part or portion thereof.

SEC. 15. The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes through the hydrants included in the contract between the said City of Helena and the Helena Water Works Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies or corporations in this city shall not exceed the following rates: For private houses, one dollar per month, for each private bathtub, thirty-three cents per month; for each private wash basin, twenty-five cents per month; for each private water-closet, thirty-three cents per month; for each private urinal, thirty-three cents per month. For irrigating lawns, gardens and grounds, where other water is taken, one dollar and twenty-five cents per month, for each fifty feet fronting on the street; where no other water is taken, one dollar and fifty cents per month. When revolving fountains and sprinklers are used, an extra price may be charged, which shall not exceed twenty-five per cent. in addi-
tion to the rate for irrigation above prescribed. Provided,
134 there shall not be more than one nozzle or sprinkler used for each fifty feet of frontage, at the rate specified in this section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any

person or persons, corporation or corporations, or company, shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water for the time so used, upon the same terms per month as above stated. Where meters are used, the charge shall not exceed the following rates, viz: For one thousand gallons per day or less, four cents per one hundred gallons; for one thousand to four thousand gallons per day, three cents per hundred gallons; for four thousand gallons per day or more, two cents per hundred gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over thirty-three per cent. more water than the monthly rate would pay for according to the meter rates herein prescribed, the said water company shall be only allowed to collect the monthly rate herein provided. If the said consumer is using over thirty-three per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of
135 service pipes therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber who he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put a stopcock on each service pipe below the sidewalk near the curb, and at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the water rates are not paid with- fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company; but the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

136 SEC. 19. No person or persons, excepting the mayor and fire marshal, and those acting under their authority, or the authority of said city council, and the agents and employees of the

said water company, shall meddle with, or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall be used only for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the "Woolston reservoir," or in the reservoir formerly belonging to Helena Water Company, and commonly known as the "Hale reservoir," a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SEC. 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors or assigns, during the full term of five years, from and after the 20th day of January, 1890, the following sums of money, to wit: Out of the general fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance and for the use of the water through said hydrants by said city for the purpose of
137 sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant, and water, as herein provided for, for the same purpose. Out of the fire department fund of said city the sum of eighty dollars per year, for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes, and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above funds for the above amounts, and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month. Provided, however, that if the said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the

month during which such failure occurs; and if such failure
138 shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said company shall receive any further payment from the said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as
139 may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance, the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of fifty thousand dollars, with two or more sufficient sureties, to be approved by the mayor, conditioned that if the said company shall receive the sums of money hereby agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner

arising from ordinance No. 93, approved November 22d, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordi-
140 nance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston, and the Helena Water Company, of Salem, Ohio, from all claims against said city to the date of this contract, arising from the ordinances in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company, during the terms of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure, wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15, 1890.

EXHIBIT "C."

Report of the Majority.

Plans and specifications for a water system outlined for the guidance of bidders.

Pursuant to the advertised notice to bidders, the City of Helena will receive bids for a complete water system, together with a supply of water through the same for the said city, which system and supply shall conform to and come within the following specifications and requirements in so far as relates to an entirely new system and supply.

The supply of water to be furnished and for which the bid-
141 der will be required to bid shall not be less than 6,000,000 gallons for each 24 hours and as much more as the bidder may be able and willing to supply.

The geographical location of the proposed source of supply will be accurately described by the bidder, and be represented by maps and plats, and if any proposed supply is capable of an increase in volume the bidder will submit with his bid a detailed description and plan by means of which the supply may be increased, and the cost of such increase. The estimates of the volume of all sources of supply will be based upon extreme low water measurement, and the city council will reserve the right at all times of making a physical test of the amount of water which is proposed to be supplied, before finally accepting any plant which may be purchased.

Bidders will furnish for the consideration of the council such abstract or abstracts of title, or other evidence of ownership, rights and privileges pertaining to their respective propositions, as will

enable the said council to thoroughly investigate and determine the right of the bidder to convey.

The quality of water of the proposed supplied shall be pure and wholesome, and free from contaminating influences as far as possible, and the city reserves the right to make such chemical analysis thereof in order to determine its purity and wholesomeness before accepting the plant.

The minimum pressure required will be 50 pounds per square inch in all portions of the city, and the arrangement of the system shall be such that the above minimum pressure of 50 pounds to the square inch shall be maintained throughout a period of 48
142 hours where a minimum of 10 one-inch fire nozzles are discharging for a continuous period of 48 hours, the normal consumption by consumers not being interfered with.

The city reserves the right, before accepting the plant, to make a physical test of the pressure, and will not be restricted as to the place or places at which test nozzles are applied, nor will the city be restricted to a theoretical exhibit of pressure.

The city reserves the right, to make at least three such tests of pressure as above described, at such times as may be to the city's interest, before accepting the pressure capacity of any proposed system, and the city will agree to make such tests within a period not exceeding 60 days after the time of making the first test, and in case any of the foregoing tests do not meet the requirements of these specifications the city will not accept the proposed plant until such requirements are complied with.

Preference will be given to systems in which the supply mains to the distributing system are built of steel or cast iron.

All supply mains will be protected from the action of frost by imbedding in the earth, or such other means as will insure the pipes against freezing. The designs of pipes will be specially investigated as to their durability and ability to withstand the action of the water, and economy and safety always considered.

The distributing system will be preferable of cast iron, and of such design as to give all of the present inhabitants of the city opportunity to tap the mains and secure a supply of water.

143 The size of mains in the distributing system shall in no instance be less than four inches in diameter, and of such larger sizes as the bidder may deem necessary to properly distribute the supply and maintain the pressure as hereinbefore provided, and in determining the size of pipes to be used due regard shall be *had — the* mains to meet the requirements of the future growth of the city and increased demand for water, with the least possible impairment of the efficiency of the plant as originally installed, both as to ability to furnish all of the inhabitants of the city with water through such mains, and the maintenance of pressure as hereinbefore provided.

The size of mains, other than as hereinbefore stated, will not be specified by the city, but intending bidders will submit their own plans and specifications for the same in conformity with the re-

quirements herein cited, and such bidders will be required to furnish their own elevations or accept such map or maps as the city may have in its possession, the accuracy of which the city will not be responsible for, it being the intention and desire of the city that in the preparation of these specifications by the bidder, that the pressure and volume of water shall gauge the dimensions of the pipes in the different parts of the city, as also the effect which future extensions and increased demands for water by reason thereof, will have upon the same, having in view at all times the proper distribution of water throughout the entire city, and the maintenance of pressure as hereinabove recited.

144 Hydrants to the number of not less than 200 will be required to be at such point or points along the said distributing system as the city council may hereafter direct, the bidder will specify the price per hydrant that will be charged the city, should the city desire to increase the number of hydrants as above stated.

The design of hydrant will not be specified by the city, but the bidders are required to submit detailed plans of the hydrant proposed to be placed by them, together with full description of the merits of the same as regards economy, durability and safety from pressure and freezing.

All valves and specials shall be of the best modern design and shall be easily accessible; bidders shall submit their proposals, complete plans and specifications containing a detailed description of all the parts of the proposed system, such exhibit to be absolutely full and explicit, in order that the city council may estimate and determine the value of what is proposed to be furnished. This requirement will apply to any and all bids that are made, both as to any bid that may be made by the owner of any existing plant in the city and as to any bids that may be made by bidders offering a new system.

To bidders offering a new system, it is to be distinctly understood that the price submitted shall cover the entire expense of the new system, as the city will not enter into any contract for the furnishing of any supply of water, or any system of waterworks, wherein the city may be called upon to pay for any extra whatsoever.

145 The plans submitted shall be executed in such detail as will enable the city to submit them to a competent engineer for examination and advice before action is taken upon the same by the city.

All mains and pipes in the distributing system shall be laid at the depth of five feet below the established grade of the respective streets; and all of the work of excavating for and covering of the pipes shall be under the supervision of the street commissioner of the city of Helena, acting under advice from the city council.

In no case shall said mains or pipes in any manner interfere with any pipes or mains laid in said streets so as to injure or obstruct the same, nor shall said mains or pipes interfere or obstruct any sewer now existing in said streets; and at all places and points in the said

city where mains or pipes approach gas mains or pipes there shall be at least six inches of earth between them. The works herein provided for shall be so constructed as to interfere as little as possible with the rights of others, and any damages resulting in and about the construction of the said plant shall be paid by the contractor, and the city shall be in no manner liable therefor.

All materials furnished by the successful bidder shall be the best of their respective kinds, and all work shall be done in a good and workmanlike manner, all with a view to permanency and durability.

Said system of waterworks to be completed and ready for acceptance by the city on or before the 1st day of July, A. D. 1897.

The successful bidder will be required to furnish a good and sufficient bond upon the letting of the contract, in an amount equal to 15 per cent. of the aggregate of amount of his bid, to be approved by the city council of the said city, as a guaranty that he will
146 well and truly carry out and perform the provisions of his contract, and said contractor will also be required to furnish a guaranty as to the durability and efficiency of said plant, covering a period of 15 years from and after the completion and acceptance of the same by the city. The mayor and committee of the city council of the city, or any officer or other person authorized by said city council, shall at all times have access to the entire works and system herein contemplated, for the purpose of inspecting, examining or testing the same, or any part thereof, until the same shall be finally turned over and accepted by the city.

In case a contract shall be awarded, the said council of said city, in the ordinance providing for said contract, may add such other safeguards and provisions for the protection of said city and its inhabitants, and for the regulation, conduct and management of said work, as to the said city council may seem for the best interests of the said city and its inhabitants.

The city council, believing that the best results can be obtained for the city where all the factors which enter into the construction of a water system are placed in competition, will not specify any particular source of supply, or any particular design or apparatus. Bidders will be expected to make such selections as will in their judgment give to the city the best practical results, wherein safety and economy in maintenance and ample capacity of pure and wholesome water are first considered, and economy in first cost of construction being at all times taken into consideration.

147 It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual, from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed, upon a plan different than that herein specified, but any such company or individual may submit any bid that it or he may desire upon any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received.

The city council will be pleased to have bidders submit plans in

triplicate, if possible, as it is the desire and intention of the said council to give full publicity to the various exhibits, in order that a thorough discussion and understanding may be had, as far as practicable, with the taxpayers, before final action is taken.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

I hereby certify that the foregoing is a full, true, correct and compared copy of the original complaint, notice of appeal, order, and injunction in cause No. 3,465, Helena Consolidated Water Co. *vs.* Wm. L. Steele, mayor of city of Helena, *et al.*, as the same appears to me of record.

In witness whereof, I have hereunto set my hand and affixed the official seal of this court, this 19th day of August, 1902.

[SEAL.] FINLAY McRAE, *Clerk*,
By WILLIAM T. CONDON,
Deputy Clerk.

148 In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA }
vs.
THE HELENA CONSOLIDATED WATER COMPANY. }

Affidavit of Stephen Carpenter.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

Stephen Carpenter, being first duly sworn, deposes and says:

1.

That he is the duly appointed, qualified and acting city clerk and attorney of the said relator, the said City of Helena, and makes this affidavit, and brings this proceeding, for and on behalf of said City of Helena, by authority of an order duly made by the city council of said city of Helena.

2.

That during all the time mentioned in this affidavit the said city of Helena is and was a municipal corporation duly organized and existing under and by authority of the laws of the State of Montana, with certain powers, among which is the power "to
149 provide said city with water, erect hydrants and pumps, build cisterns and dig wells in the streets for the supply of engines and buckets; to provide for the prevention and extinguishment of fires; and to make regulations to secure the general health of the inhabitants."

3.

That it is the duty of the said city, under the said laws, to provide and maintain a system of sewerage for said city and the inhabitants thereof, and to extinguish fires within its limits; and that it is necessary for said city to have a supply and pressure of water at all times adequate for these and other purposes, that it may protect the property of said city, and the lives, property and health of the inhabitants thereof, as is of it by the said laws required.

4.

That the said Helena Consolidated Water Company is, and during all the times mentioned in this affidavit was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, for the purpose, among other things, of supplying the said city of Helena, and the inhabitants thereof, with water.

5.

That the said Helena Consolidated Water Company has had, for the past five years, and now has, a sufficient supply and pressure of water and water pipes, mains and hydrants laid and placed in the said city of Helena and its streets, and now is in a position to, and is able to, furnish a sufficient supply and pressure of water to said city of Helena for fire, sewerage and other purposes.

150 6.

That for the past five years the said Helena Consolidated Water Company has supplied the said City of Helena and its inhabitants with water under and by authority of a certain ordinance of said city of Helena duly passed and in force and numbered 248, which said ordinance is attached hereto and made a part hereof and marked Exhibit "A;" which said ordinance and all its terms, conditions and provisions were within the time therein prescribed duly accepted by said Helena Consolidated Water Company, and its bond duly filed.

7.

That by virtue of said ordinance No. 248, the said Helena Consolidated Water Company has, since the 20th day of January, 1890, and until the 20th day of January, 1895, supplied the said city of Helena with water for fire, sewerage, and other purposes, as provided in said ordinance.

8.

That heretofore, and before the said 20th day of January, 1895, the city of Helena duly advertised for bids for supplying the said city of Helena with water for fire, sewerage and other purposes, from and after that date.

9.

That in accordance with said advertisement said bids were opened by said city on the 8th day of January, 1895, when it appeared that only one bid had been made, which said bid was made by the said Helena Consolidated Water Company, which said bid is hereto attached and made a part hereof and marked Exhibit "B."

151

10.

That the city council of the said city of Helena duly rejected said bid on said 8th day of January, A. D. 1895, for the reason that the same was unreasonable and excessive.

11.

That after the said 20th day of January, 1895, and before the commencement of this proceeding, the said City of Helena duly demanded of said Helena Consolidated Water Company that it furnish a sufficient supply of water to said city of Helena for fire, sewerage and other purposes.

12.

That the said City of Helena is ready, willing and able to pay the said Helena Consolidated Water Company the reasonable value of such water, and that after said demand, and before the commencement of this proceeding, it duly tendered to the said Helena Water Company the sum of $85 for five days' supply of water for the purposes mentioned herein, which sum and rate the said City of Helena, on information and belief, avers to be reasonable, and thereupon demanded that it furnish to said city water adequate for such purposes for said period of five days, but that the said Helena Consolidated Water Company refused, and still refuses, to supply the water so demanded, or to furnish water to the said city of Helena at a less rate than in the said bid herein referred to, and unless bids for a supply of such water are duly advertised for, and a contract duly entered into with said city in accordance with said advertisement.

152

13.

That prior to the time of the passage of the said ordinance, various companies and private parties owned water rights available to supply the said city of Helena and the inhabitants thereof with water, and had been so supplying them through mains laid in the streets of the said city, under franchises by it granted; but that, immediately prior to the passage of the said ordinance the said Helena Consolidated Water Company had become the owner, by purchase or otherwise, of all of the said water rights and franchises, and of all water rights or water available or adequate to supply the needs of the said city or the inhabitants thereof, all of which facts were known to the said city council and the mayor of said city at the time of the passage of the said ordinance.

14.

That the said Helena consolidated Water Company is and has ever since remained the only company or person having any franchise which will enable it or him to supply the said city or the inhabitants thereof with water, and is the only source from which water can be obtained to supply said city of Helena with a sufficient supply and pressure of water for fire, sewerage and other purposes; and affiant avers, upon information and belief, that it would take at least from one to two years to construct works adequate to conduct to and supply said city of Helena with a sufficient quantity and pressure of water for the purposes herein mentioned.

15.

That the said city of Helena is solvent and able to pay for
153 all water furnished for said purposes to said city.

16.

That the usual manner of doing business by the said City of Helena, and other municipal corporations, is to pay for labor or materials after it is performed or furnished and not in advance.

17.

That the said City of Helena has no plain, speedy, or adequate remedy in the ordinary course of law and said city will suffer irreparable damage unless a writ of mandate is allowed.

Wherefore, affiant prays that a peremptory writ of mandate issue out of this honorable court, directed to said Helena Consolidated Water Company, its officers, agents and employees, commanding it to furnish a sufficient supply and pressure of water to said city of Helena for fire, sewerage and other purposes, and for such other and further relief as may seem proper and right.

(Signed) STEPHEN CARPENTER.

Subscribed and sworn to before me this 31st day of January, 1895.

CHARLES F. ELLIS,
Notary Public.

STEPHEN CARPENTER AND
T. J. WALSH,
Attorneys for Relator.

154 EXHIBIT "A."

Ordinance No. 248.

To provide the city of Helena and its inhabitants with a permanent water supply.

Whereas, the city council of the city of Helena did advertise in the "Helena Herald," the "Helena Journal," and the "Helena Independent" for a period of forty days, to-wit, from the 13th day of

June 1889, to the 1st day of August, 1899, with specifications, for proposals for a water supply for the use of said city and the inhabitants thereof, and,

Whereas, it was found and determined, upon an examination of the several proposals received in response to such advertisement, and after due consideration thereof, that George F. Woolston was the lowest responsible bidder therefor; and,

Whereas, the Helena Consolidated Water Company is the assignee and successor of the said George F. Woolston; and,

Whereas, the city council of the said city of Helena has awarded the said contract to the said Helena Consolidated Water Company as such assignee and successor:

Now, therefore, be it ordained by the city council of the city of Helena:

SECTION 1. There is hereby granted to the Helena Consolidated Water Company and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through
155 all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage, and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required. Provided, however, that nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys and public grounds of said city with water mains and pipes, or the exclusive right — conveying, distributing, or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

SEC. 2. For the purpose of laying, repairing, keeping and maintaining such water mains and pipes, there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making excavations in and upon any and all streets, avenues, alleys, public grounds and thoroughfares of the city. Provided, that it or they shall, without unreasonable delay, restore the same to as
156 good condition as they were before the said excavations were made, and remove all earth, sand, rubbish and other material.

SEC. 3. All pipes and mains, including the service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location of streets; and all repairs and extensions of such pipes and mains shall be done

under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said city of Helena from regrading or rechanging the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations to whom such franchises, rights or easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the
157 property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors or assigns.

SEC. 5. It is hereby provided that in no case shall the mains and pipes — be laid and maintained under the provisions of this ordinance, in any manner interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof, nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said city of Helena by mains hereafter laid by the said Helena Consolidated Water Company, or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas main- or pipes there shall be at least six inches of earth between the same.

SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction), and for other purposes; and such supply shall be full, ample and sufficient for the present population of the said city, and for the future population of the said city as the same may be from time to time during the full term of five
158 years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render if unhealthy or unfit for domestic use.

SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds

to the square inch fire pressure, and forty pounds to the square inch ordinary pressure shall be maintained at said points, and at all other points of equal height.

SEC. 8. The said Helena Consolidated Water Company shall lay, or provide at its own cost and expense, twenty miles of mains within the limits of said city, exclusive of the amount of mains connecting the works of said company with the point or points of distribution, and such mains shall be of the following sizes, and on the following streets in the said city of Helena, respectively: At least ten inches in inner diameter, on Lawrence street from Benton avenue to Main street; on Rodney street from Broadway to Helena avenue; on Main street from Bridge street to Helena avenue; on Helena avenue from Main street to the right of way of the Northern Pacific Railroad Company; on Broadway from Main street to Rodney street. At least eight inches in inner diameter on Madison avenue from Lawrence street to Davis street in the Hauser addition; on Lawrence from Madison avenue to Benton avenue; on Rodney street from Bridge street to Broadway; on Fifth avenue from
159 Warren street to Hoback street; on Ninth avenue from Rodney street to Idaho avenue. At least five inches in inner diameter on Benton avenue from Edwards to Lyndale avenue; on Clore street from Bridge street to Benton avenue at Flowerree street; on Lawrence street from Madison avenue to the western boundary of the city; on Clark street from Strawberry street to Clore street; on Howey street from Adams street to Clark street; on Jefferson street from Adams to Ming street; on Ming street from Jefferson street to Howey street; on Bridge street from Clore street to Chaucer street; on west Main street from Bridge street south 1,050 feet; on Rodney street from Bridge street south 1,250 feet; on Wood street from Main street to Ewing street; on Ewing street from Fifth avenue to Helena avenue; on Jackson street from Wood street to Sixth avenue; on Sixth avenue from Jackson street to Main street; on Broadway from Rodney street to Beattie street; on Fifth avenue from Hoback street to Tietjen street; on Gallatin street from Helena avenue to Fifth avenue; on Lyndale avenue from Benton avenue to Helena avenue; on Third street Northern Pacific addition, from Helena avenue north five hundred feet; on Grand street from Jackson street to Warren street; on Warren street from Broadway to Helena avenue; on Hemlock street from Madison avenue to Harrison avenue; on Chaucer street from Bridge street to Broadway. At least four inches in inner diameter, on Dearborn street from Lawrence street to Davis street in Hauser addition; on Cutler street from West Main to Rodney street on Pine street from Joliet
160 street to Rodney street; on Water street from Cutler street south four hundred and thirty feet; on Breckenridge street to Beattie street; on Eighth avenue from Eighth avenue to Hoback street; on Hobock street to Eleventh avenue from Rodney street to Hoback street; from Eleventh avenue to Pflaumie street. At least three inches in inner diameter on Davis street in Hauser addition from Madison avenue to Benton avenue; on Strawberry street from

Clark street to Lawrence; on Adams street from Howey street to Jefferson street; on Davis street from Broadway to Fifth avenue; on Hoback street from Fifth avenue to Eleventh avenue.

In making up the said twenty miles of mains the said Helena Consolidated Water Company may put in and shall be allowed for any pipes or mains now laid in any of the streets of the city of Helena, and owned by the said water company, not counting, however, more than one main or pipe upon the same portion of any street, and in addition to such mains and pipes as are now laid, and which may be used under the provisions of this ordinance, the said Helena Consolidated Water Company shall lay such other mains, of such sizes, on such other streets as may be ordered by the said city council of the said city so as to make its full complement of mains within said city twenty miles.

SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said
161 hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be nonfreezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city, and formerly belonging to the Helena Water Company, such hydrants need not be changed or removed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council from time to time shall direct, which said work shall be commenced and prosecuted to completion with diligence, and without unreasonable delay, and shall place and maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of a diameter of less than six inches, then one hydrant for each one-seventh of a mile; said hy-
162 drants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said

city. Provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines of mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the
163 twenty miles of mains hereinbefore provided for, on or before the first day of July, 1890.

SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said city council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

SEC. 15. The said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed, in accordance with the terms of this contract furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants, included in the contract between the said city of Helena and the Helena Water Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the 1st day of July, 1890.

SEC. 16. The charges for water furnished by the said Helena Consolidated Water Company to any persons, bodies, or corporations in this city, shall not exceed the following rates; for private houses, one dollar per month; for each private bathtub, thirty-three cents per month; for each private wash basin, twenty-five cents per month; for each private water-closet, thirty-three cents per
164 month; for each private urinal, thirty-three cents per month; for irrigating lawns, gardens and grounds, where other water is taken, one dollar and twenty-five cents per month, for each fifty feet fronting on the street; when no other water is taken, one dollar and fifty cents per month. When revolving fountains and sprinklers are used an extra price may be charged, which shall not exceed twenty-five per cent. in addition to the rate of irrigation above prescribed; provided, there shall not be more than one nozzle or sprinkler for each fifty feet of frontage at the rates specified in this

section. All charges for irrigation shall be limited to the months of May, June, July, August, September and October. And in case any person or persons, corporation or corporations, or company shall use water for irrigation purposes at any other time than during the months herein mentioned, such person or persons, corporation or corporations, or company, shall pay to the said contractor, or its successors or assigns, for the use of such water, for the time so used, upon the same terms per month as above stated. Where meters are used the charge shall not exceed the following rates, viz., for one thousand gallons per day or less, four cents per one hundred gallons; for one thousand to four thousand gallons per day, three cents per one hundred gallons; for four thousand gallons per day or more, two cents per one hundred gallons. When said water company believes that water is being wasted or unnecessarily used, it may place a meter on the service pipe communicating with the said premises, but if it is found that such consumer is not using over thirty-three per cent. more water than the monthly rate
165 would pay for, according to the meter rates herein prescribed, the said water company shall only be allowed to collect the monthly rate herein provided. If the said consumer is using over thirty-three per cent. more than the monthly rate would pay for, then the said water company may collect meter rates as herein specified.

SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes herewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided, always, that said company shall not refuse to permit connections to be made by, or to sell, or deliver water to any persons who shall offer to pay for the same, and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stopcock on each service pipe below the sidewalk near the curb, at its own proper cost and expense, and shall box the same securely, and place the cover flush with
166 the sidewalk, and may turn off the water from any premises when the water rates are not paid, within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company; bu- the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

SEC. 19. No person or persons, excepting the mayor and fire marshal, and those acting under their authority, or the authority of the said city council, and the agents and employees of said water company, shall meddle with *with*, or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company, and commonly known as the "Woolston reservoir" or in the reservoir formerly belonging to Helena Water Company, and commonly known as the "Hale reservoir," a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

SEC. 21. There is hereby appropriate[illegible]t of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors or assigns, during
167 the full term of five years from and after the 20th day of January, 1890, the following sum of money, to wit: Out of the general fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and maintained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance, and for the use of the water, through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance, to be kept and maintained by said Helena Consolidated Water Company, on the said twenty miles of mains provided for in this ordinance, and for the use of the water through the said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council during the said term of five years to levy annual taxes under the provisions of the charter of said city, authorizing the levy of taxes for general purposes, and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above
168 funds for the above amounts, and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month. Provided, however, that if the said company shall fail to comply with the requirements herein

contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said company shall receive any further payment from the said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action, or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such
169 damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the mains of said company.

SEC. 25. Within thirty days after the passage of this ordinance, the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing, for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of fifty thousand dollars, with two or more sufficient sureties, to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two
170 years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from

any and all damages, costs, expenses or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner arising from ordinance No. 93, approved November 22d, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no effect or force whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston, and the Helena Water Company of Salem, Ohio, from all claims against said city to the date of this contract arising from the ordinances in the section mentioned.

SEC. 26. It is hereby declared and understood to be the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the terms of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample and sufficient supply of good, pure and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed.

Approved January 15th, 1890.

EXHIBIT "B."

To the honorable mayor and city council of the city of Helena, Montana.

GENTLEMEN: In response to the advertisement of the city clerk for proposals to furnish water to the city of Helena, and its inhabitants, the Helena Consolidated Water Company submits the following proposition:

171 To furnish an ample supply of good water upon the same basis and terms as provided in the contract between said water company and said city, now about to terminate, with the following exceptions:

I. That said contract shall be for a period of ten years.

II. That the company shall receive ninety dollars ($90) per year each, for two hundred and sixty-five (265) hydrants, as now located, or as may hereafter be located by the city; and sixty dollars ($60) per year each, for all hydrants which may hereafter be erected and furnished on extensions hereafter ordered by the city council.

III. No extensions shall be ordered for less than a six (6) inch main.

IV. The company shall furnish a pressure for fire purposes of at least sixty (60) pounds to the square inch at the ground floor of the county courthouse in said city, and at all points of equal height in said city; and shall furnish such pressure at all times on all mains as may be requisite and necessary to give an ample supply of water for all other purposes.

This proposal is subject to such modifications as to detail as may be agreed upon by this company and your honorable body.

If the city desires to purchase the plant of this company, the com-

pany hereby proposes to sell and convey unto said city its entire plant for the exact amount of the investment of said company in said plant to this date.

The required bond accompanies this proposal.

172 Dated Helena, Montana, January 8th, 1895.

HELENA CONSOLIDATED
WATER COMPANY,
By WM. A. CHESSMAN, *President.*

Attest:

[Seal of said Company.]

JNO. B. CLAYBERG, *Secretary.*

STEPHEN CARPENTER,
T. J. WALSH,
Attorneys for Relator.

Pleading filed Jan. 31, 1895.

JOHN BEAN, *Clerk.*

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Order for Issuance of Writ of Mandate.

On reading and filing the affidavit of Stephen Carpenter, city clerk and attorney of the city of Helena, it is this 31st day of January, 1895, hereby ordered that an alternative writ of mandate issue herein commanding the said Helena Consolidated Water Company to forthwith *to* furnish a sufficient supply and pressure of water to the city of Helena for fire, sewerage and other purposes, or that it ap-

173 pear before this court on Tuesday the 5th day of February, 1895, then and there to show cause why it has not done so.

By the court:

HORACE R. BUCK, *Judge.*

January 31st, 1895.

Filed January 31, 1895.

JOHN BEAN, *Clerk,*
By G. O. FREEMAN, *D. C.*

COUNTY OF LEWIS AND CLARKE,
State of Montana.

OFFICE OF THE SHERIFF.

I hereby certify that I received the annexed writ of mandate and affidavit on the 31st day of January, A. D. 1895, and personally

served the same on the 31st day of January, A. D. 1895, upon the Helena Consolidated Water Company, by Wm. A. Chessman, president, for defendant, by delivering to said Wm. A. Chessman, president, for said Helena Consolidated Water Company, personally, in the county of Lewis and Clarke, a copy of said writ of mandate, and affidavit, and a copy of the complaint in said action therein named, at the same time showing him the annexed original writ of mandate and affidavit, and informing him of the contents thereof.

Dated, Helena, January 31st, 1895.

J. H. JURGENS, *Sheriff*,
By C. H. MARTIEN,
Deputy Sheriff.

174	Service	$1.00
	Copy	2.40
	Mileage	.20
	Total	$3.60

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF Helena
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Writ of Mandate.

The State of Montana to the Helena Consolidated Water Company:

Whereas it manifestly appears to us by the affidavit of Stephen Carpenter, city clerk and attorney of the city of Helena, the party beneficially interested herein, that the said Helena Consolidated Water Company unjustly and unlawfully refuses to furnish water to the city of Helena, for fire, sewerage, and other purposes, the allegations concerning which are particularly set out in the copy of the said affidavit hereto attached and made a part hereof; and that there is not a plain, adequate and speedy remedy in the ordinary course of the law:

175 Therefore, we do command you that immediately after the receipt of this writ, you supply the said city of Helena with a sufficient quantity and pressure of water for fire, sewerage and other purposes, or that you show cause before this court at the court-room thereof in the city of Helena, Lewis and Clarke county, Montana, at the opening of the court on Tuesday, the 5th day of February, 1895, why you have not done so.

Witness the Honorable Horace R. Buck, judge of said court, and the seal thereof, this 31st day of January, 1895.

[SEAL.] JOHN BEAN, *Clerk*,
By —— ——, *Deputy.*

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Answer.

Now, comes the above-named defendant, The Helena Consolidated Water Company, and for answer to the affidavit and writ of mandate on file herein, says:

176 I.

1. It admits the allegations of paragraphs 1 to 7, inclusive, of the affidavit on file herein.

2. It denies that the said city duly advertised for bids for supplying the city with water for fire, sewerage and other purposes from and after the 20th day of January, 1895, in accordance with the provisions and conditions of the charter of said city, and attaches hereto a copy of the only advertisement made by said city in that behalf, which is marked Exhibit "A" and made a part of this answer.

3. It admits that said city, prior to the commencement of this proceeding, tendered to this company the sum of eighty-five dollars ($85) for five days' supply of water for fire, sewerage and other purposes of said city, and demanded of this defendant that it furnish a sufficient supply of water to said city for said purposes but denies that the amount so tendered was reasonable, and alleges the facts to be as hereinafter in this answer alleged.

4. Admits that this defendant refused, and still refuses, to supply the water so demanded upon the terms and for the prices tendered by the said city, and refuses to furnish water to said city at a less rate than in said bid referred to in said affidavit, and also refuses to furnish water unless bids for a supply of such water are duly advertised for in accordance with the terms and conditions of the charter of said city, and unless a contract is duly entered
177 into between this defendant and said city, for such water, in accordance with such charter and advertisement.

5. Denies that this defendant prior to the passage of the ordinance set forth in said city's affidavit, became the owners of all water rights and franchises, and all water rights and water available or adequate to supply the needs of said city, and the inhabitants thereof.

6. It denies that this defendant is the only source from which water can be obtained to supply said city of Helena, with a sufficient supply of pressure of water for fire, sewerage or other purposes; but it admits that at present it is the only company or person having any franchise which will enable it, or him, to supply said city and the

inhabitants thereof with water, and the only one in condition to immediately begin the delivery of such supply.

7. Denies that its bid set forth in said affidavit was, or is, unreasonable or excessive.

And this defendant, for a further answer to said affidavit and writ, alleges:

1. That it is now, and at all the times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana. A true copy of its certificate of incorporation is hereto attached, marked Exhibit "B," and made a part of this answer.

2. That the City of Helena is now, and at all the times hereinafter was, and is, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Montana.

3. That on the 15th day of January, 1890, the said City of Helena, by its mayor and common council, duly enacted an ordi-
178 nance, which is number 248, and a copy of which is attached to the affidavit of plaintiff on file herein, and reference is hereby made to said affidavit, and the same is hereby made a part of this answer.

4. That this defendant duly accepted the terms and conditions of said ordinance, and both the city and this defendant have acted under the terms and conditions of said ordinance from the date thereof up to and including the 20th day of January, 1895.

5. That under and by virtue of its certificate of incorporation and the terms of said ordinance this defendant became and is now entitled to carry on its business, as set forth in said certificate of incorporation in the city of Helena, and its vicinity, and to furnish water to the inhabitants of said city, at not exceeding the maximum rate fixed by said ordinance, for the period of twenty years from and after the passage of said ordinance; and also to furnish water to said city in case said city desires to purchase the same.

6. That under and by the terms and conditions of said ordinance maximum rates were agreed upon between this defendant and the said city for furnishing the inhabitants of said city with water, but that no maximum or other rates were fixed by said ordinance by defendant's certificate of incorporation, or otherwise, for water to be supplied by said defendant to said city, in case said city desired to purchase the same, except that as a part of said ordinance, a contract was duly entered into between said city and this defendant for the furnishing of water by this defendant to said city for the purposes therein stated, and for the prices therein agreed upon,
179 for the period of five years from and after the 20th day of January, 1890, which contract has now expired.

That since the expiration of said contract, there has been, and now is, no agreement or contract between said city and this defendant, for the furnishing of water to said city for fire, sewerage or other municipal purposes.

7. That it is unreasonable to demand that this defendant furnish

water to the city for municipal purposes from day to day and in violation of its reasonable rules and regulations.

That this defendant has duly adopted a rule and regulation that in all cases, unless qualified by special contract, all consumers are required to pay for water for three months in advance, except where meters are used, in which case consumers are required to pay at the end of each month.

8. That defendant further alleges that it has acquired ample facilities and water to furnish said city with an abundant supply of water for municipal purposes, at an actual expenditure of nearly one and one-half million of dollars; and alleges that it is ready and willing to so furnish the same at such prices as will enable this defendant to maintain and operate its plant, pay all its fixed and other necessary charges, and receive a reasonable compensation for the investment of its stockholders in said plant and property.

9. That this defendant has operated its plant in the most economical manner possible since the organization of this company; that it has paid no excessive salaries or other charges, but that
180 every dollar this company has earned has been properly applied to its plant and the operation thereof. That since the organization of this company, to wit, the 1st day of October, 1889, up to the 1st day of January, 1895, the receipts of this defendant from all sources have been less than its necessary expenditures in the amount of $33,009.58; that its earnings since the 1st day of January, 1890, to the 20th day of January, 1895, have been less than the actual and necessary disbursements of this defendant in and about said plant and the operation thereof; that no dividend of any kind, character or description has ever been paid to any of these stockholders of said company since it commenced its operations.

10. That this defendant has now outstanding $949,000, in mortgage bonds; $709,000 of which bears semi-annual interest at the rate of six per cent. per annum; and $240,000 bears semi-annual interest at the rate of five per cent. per annum; that it has a floating indebtedness of $258,200, upon which it is compelled to pay various rates of interest running from seven to ten per cent. per annum; that the operating expenses, taxes and licenses for the year 1894 have been $18,550.07; that this defendant paid $77,327.24, for interest on its outstanding obligations for the year 1894; that its receipts for the year 1894 from the city under said contract were $24,328.46, and its receipts for said year from all sources were $89,206.37, leaving a deficit in the treasury of the company of $6,770.94.

11. That the present yearly revenues from the inhabitants
181 of the said city at the maximum rates fixed by said ordinance will leave a deficit in the treasury of this defendant of at least $24,000, after this defendant pays all of its fixed charges and operating expenses, and unless it receives a sufficient remuneration from said city to pay this deficit, it cannot operate or carry on its business, and cannot furnish water to said city of Helena, or its inhabitants; that it cannot increase its charges for domestic services

during the next fifteen years without the consent of the city council, because of the provisions of said ordinance relative to maximum charges; that it has no other sources of revenue than from the city and its inhabitants.

12. That under and by virtue of the terms and conditions of its charter from the State of Montana, it is given the power to contract for and sell water to the city of Helena and its inhabitants; that it is willing to sell said water to the said city for municipal purposes at the prices set forth in its bid, a copy of which is attached to plaintiff's affidavit, marked Exhibit "B," to which reference is hereby made, and the same is hereby made a part hereof.

13. It denies that the amount tendered to this defendant by said city is a reasonable amount for the furnishing of water to said city, and alleges that the only reasonable amount for such services and water is at the rate set forth in said defendant's bid, hereinbefore referred to.

That it cannot operate its plant and furnish said water for a smaller rate or sum without sustaining an absolute loss on its business in each and every year.

182 14. It alleges that the said city of Helena has no right to fix or establish any rate of payment for water to be furnished by this defendant to said city for municipal purposes.

15. It alleges that there is no duty devolving upon this defendant to furnish water to said city for municipal purposes, except under a purchase of said water from this defendant by said city. That this defendant is the owner of all the water brought into said city through its pipes, and has good right and lawful authority to sell and furnish the same.

16. That if defendant is compelled to furnish water to the city for municipal purposes at the rate offered by said city, it will result in the taking of defendant's property without due process of law, and without just or adequate compensation being made, paid or provided therefor.

Wherefore, this defendant asks that the proceedings herein be dismissed.

E. W. TOOLE,
McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

STATE OF MONTANA,
County of Lewis and Clarke, } ss:

W. A. Chessman, being first duly sworn, according to law, deposes and says that he is an officer of The Helena Consolidated Water Company, the defendant herein who makes the foregoing answer, to wit, its president; that he has read said answer
183 and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. A. CHESSMAN.

Subscribed and sworn to before me this the 6th day of February, A. D. 1895.

[SEAL.]

O. W. McCONNELL,
Notary Public in and for said County and State.

Received copy of the within this 6th day of February, 1895.

STEPHEN CARPENTER,
Attorney for Relator.

EXHIBIT "A."

Proposals for Water Supply for the City of Helena, Montana.

Notice is hereby given that, pursuant to an order of the city council of the city of Helena, Montana, the undersigned will receive bids until 12 o'clock noon of the 8th day of January, 1895, at his office *of* the city hall, in said city of Helena, for supplying the said city of Helena, with water for fire, sewerage, and other purposes for the term of one to ten years. For further information apply to the city clerk of said city of Helena. Proposals must be accompanied by bonds in the sum of five thousand dollars to enter into contract if bid shall be accepted. The right to reject any and all bids is expressly reserved.

STEVEN CARPENTER,
City Clerk of Helena, Montana.

184 *Certificate of Incorporation of the Helena Consolidated Water Company, Helena, Montana.*

TERRITORY OF MONTANA,
County of Lewis and Clarke, } *ss:*

We, the undersigned persons, each of lawful age and all citizens of the United States, desirous of forming a corporation for the purpose of carrying on a business designed to aid in the productive and industrial interests of the country and the development thereof, to the end that we may avail ourselves of the benefits of chapter twenty-five of the fifth division of the Compiled Laws of 1887, Montana Territory, entitled, "Corporations for industrial or productive purposes," and all acts and parts of acts amendatory thereof, or supplementary thereto, do hereby declare, certify and acknowledge as follows:

I.

That the corporate name of the said company shall be the "Helena Consolidated Water Company, Helena, Montana."

II.

The objects for which said company is formed are to acquire by grant, charter, purchase or otherwise, the franchise, right or privi-

lege of entering upon, using, occupying and enjoying the streets, alleys, avenues, thoroughfares, parks, grounds and public places of the city of Helena, for the purpose of laying, maintaining and operating water ways and water mains and connections, and
185 of erecting, operating and maintaining hydrants, stopcocks, turn-offs and such other appliance or appliances as may be necessary in the conduct or control of a system of water mains throughout the city; to acquire by purchase, grant, devise, appropriation or otherwise, water for the use of the said city of Helena and vicinity and the inhabitants there-, through the system of water mains aforesaid; to acquire by purchase, erection, construction or otherwise, any and all machine-shop-, pumping-stations, reservoirs, pumps, engines, boilers and all other buildings, structures, machines and machinery of every kind, character or description, necessary or convenient in the acquisition, construction, maintenance and operating of a complete water system for the purpose of supplying the city of Helena and vicinity and the inhabitants thereof with an abundant supply of good wholesome water for public, municipal, domestic, trade, manufacture, fire, sewerage, irrigation and other purposes; to sell, contract, furnish and deliver through such water system to the city of Helena and vicinity and the inhabitants thereof, water for public, municipal, domestic, trade, fire, sewerage, irrigation and other purposes.

III.

That the term of existence of said corporation shall be for the period of twenty (20) years from and after the 1st day of July A. D. 1889.

IV.

That the capital stock of said company shall be one million five hundred thousand dollars ($1,500,000), which shall be divided into fifteen thousand (15,000) shares, of the par value of one hundred dollars ($100) each.

186 V.

That the principal place of business of said corporation shall be in the city of Helena, Lewis and Clarke county, Montana Territory, but that the said corporation may have a branch office, if it is so determined upon by its board of trustees, either in the city of Boston, State of Massachusetts, or the city of New York, State of New York, where meetings of the board of trustees of said corporation may be held.

VI.

That the number of trustees who shall manage the affairs of the corporation for the first three months shall be five (5), and their names are as follows: George O. Freeman, Anselm J. Davidson, William A. Chessman, Albert R. Gates, and Clyde J. Tooker.

In witness whereof, we have hereunto set our hands and seals this 1st day of July, A. D. 1889.

CLYDE J. TOOKER. [SEAL.]
ANSELM J. DAVIDSON. [SEAL.]
WILLIAM A. CHESSMAN. [SEAL.]

In presence of:

——— ———.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

On this 1st day of July, A. D. 1889, personally appeared before me, I. Hamburger, a notary public in and for said county and Territory, Clyde J. Tooker, Anselm J. Davidson, and William A. Chessman, whose names are subscribed to the foregoing instrument as parties thereto, personally known to me to be the same per-
187 sons described in and who executed the said instrument, and who each duly acknowledged to me that they, each of them respectively, executed the same freely and voluntarily and for the uses and purposes therein mentioned.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

I. HAMBURGER,
Notary Public, said County and Territory.

TERRITORY OF MONTANA, } ss:
County of Lewis and Clarke, }

I hereby certify the foregoing to be a true, correct and compared copy of the acticles of incorporation of the "Helena Consolidated Water Company," filed in my office this day.

Witness my hand and the seal of said county this 1st day of July, A. D. 1889.

J. S. TOOKER,
County Recorder.

UNITED STATES OF AMERICA, } ss:
Territory of Montana, }

I, Louis A. Walker, secretary of the Territory of Montana, do hereby certify that I have compared the annexed and foregoing copy of the articles of incorporation of the "Helena Consolidated Water Company," with the original thereof, filed in my office on the 1st day of July, A. D. 1889, and that the same is a correct transcript therefrom, and of the whole of said original certificate.

188 Witness my hand and the seal of the Territory of Montana, this 22d day of July, A. D. 1889.

LOUIS A. WALKER,
Secretary of the Territory of Montana.

Recorded in the office of the county clerk and recorder on the 1st day of July, 1889, at 3.10 p. m.
(Signed) J. S. TOOKER.

Certified copy.
Pleading filed February 6, 1895.
JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

STATE OF MONTANA *ex Rel.* THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Demurrer.

Comes now the above-named relator, The City of Helena, and demurs to the answer of the said respondent, The Helena Consolidated Water Company, and for ground of demurrer avers that the
189 said answer does not state facts sufficient to constitute a defense to relator's petition for a writ of mandate herein.

STEPHEN CARPENTER AND
T. J. WALSH,
Relator's Attorneys.

Demurrer filed February 7, 1895.
JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

STEPHEN CARPENTER,
T. J. WALSH,
Attorneys for Relator.

3026.

(Title of Court, Title of Cause.)

Order Sustaining Demurrer.

Done in open court this 20th day of February, 1895.

Relator's demurrer to answer herein was this day by court sustained and respondent was granted ten days with- which to file amended answer.
(Signed) HORACE R. BUCK, *Judge.*

190 In the District Court of the First Judicial District of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF Helena, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Opinion.

Proceeding in mandamus.

The City of Helena as relator seeks the intervention of this court to compel The Helena Consolidated Water Company, a corporation, as respondent, to furnish it with water for city purposes.

Respondent was incorporated under the general corporation laws of the Territory of Montana on July 1st, 1889. The purposes for which it was incorporated as set forth in its certificate of incorporation, were as follows:

"The objects for which said company is formed are to acquire by grant, charter, purchase or otherwise, the franchise, right or privilege of entering upon, using, occupying and enjoying the streets, alleys, avenues, thoroughfares, parks, grounds and public places of the city of Helena, for the purpose of laying, maintaining and operating water ways and water mains and connections
191 * * * to acquire by purchase, grant, devise, appropriation or otherwise water for the use of the said city of Helena and vicinity and the inhabitants thereof, through the system of water mains aforesaid * * * for the purpose of supplying the city of Helena and vicinity and the inhabitants thereof with an abundant supply of good wholesome water for public, municipal, domestic, trade, manufacture, fire, sewerage, irrigation and other purposes; to sell, contract, furnish and deliver through such water system to the city of Helena and vicinity and the inhabitants thereof, water for public, municipal, domestic, trade, fire, sewerage, irrigating and other purposes."

On January 15th, 1890, an ordinance was adopted by the city of Helena and accepted by the company, pursuant to the terms of which the latter was to furnish all the inhabitants of Helena with water at certain prescribed rates for twenty years; and after the first five years of said period, the city itself for city purposes, if it should desire to purchase water from the company. No rate was prescribed for the water for city purposes, however, if the city sh-uld desire to purchase during the fifteen years' period aforesaid. The ordinance also contained a contract whereby on terms provided in detail, the company was to furnish the city with water for the first five years.

This five year contract expired on January 20th, 1895.

The ordinance did not grant any exclusive privilege to the company for supplying water.

The city is solvent.

192 The pleadings show the facts aforesaid and also that shortly prior to this application for a mandamus, the city made a demand that the water company should supply it with water, which demand was refused. It is conceded that the water company has ceased to supply the city with water for municipal purposes.

To the affidavit or complaint of relator the respondent has answered, and a demurrer interposed to the answer is before me for a decision.

It is also conceded by the pleadings that the city can obtain the water it needs at the present time only from the source owned and controlled by the company.

Relator maintains that by reason of the acceptance of its franchise, respondent is in duty bound to supply this needed water at a reasonable rate, even without a tender of such rate by the city prior to the water being supplied.

Section 13, article VII of the city's charter is as follows:

"In all contracts involving the expenditure of one hundred dollars or more, the city council shall advertise the same with specifications for a period to be prescribed by ordinance, and award the same to the lowest responsible bidder."

Respondent urges that by virtue of said section and the city ordinance providing the details for its application that if it supplies water without an express contract resulting from an advertisement for bids, it cannot recover for the water furnished as to any excess in its value over $100.

193 To this relator answers that the company having a practicalmonopoly of water and being the only possible bidder to advertise for bids would be an act of supererogation.

Respondent contends further that even conceding no advertisement is necessary, still it is not in a position to be compelled to furnish the water demanded until it has been tendered a reasonable price for the same.

The pleadings also disclose that before January 20th, 1895, the date on which the ordinance contract between the parties hereto expired, the city advertised for bids as follows:

"*Proposals for Water Supply for The City of Helena, Montana.*

Notice is hereby given that, pursuant to an order of the city council of the city of Helena, Montana, the undersigned will receive bids until 12 o'clock noon of the 8th day of January, 1895, at his office in the city hall, in said city of Helena, for supplying the said city of Helena with water for fire, sewerage and other purposes for the term of one to ten years. * * *

STEVEN CARPENTER,
City Clerk of Helena, Montana."

And in reply to the advertisement aforesaid, respondent made the following offer to the city:

"To the honorable the mayor and city council of the city of Helena, Montana.

GENTLEMEN: * * * The Helena Consolidated Water Company submits the following proposition:

194 To furnish an ample supply of good water upon the same basis and terms as provided in the contract between said water company and said city now about to terminate, with the following exceptions:

I. That said contract shall be for a period of ten years.

II. That the company shall receive ninety dollars ($90) per year each, for two hundred and sixty-five (265) hydrants, as now located, or as may hereafter be located by the city, and sixty dollars ($60) per year each, for all hydrants which may hereafter be erected and furnished on extensions hereafter ordered by the city council. * * *

If the city desires to purchase the plant of this company the company hereby proposes to sell and convey unto said city its entire plant for the exact amount of the investment of said company in said plant to this date.

The required bond accompanies this proposal.

Dated Helena, Montana, January 8th, 1895.

HELENA CONSOLIDATED WATER COMPANY,
By WILLIAM A. CHESSMAN, *President.*

Attest:

[Seal of said Company]

JOHN B. CLAYBERG, *Secretary.*"

This bid was rejected by the city.

It also appears that prior to the commencement of this suit and subsequent to the rejection of the company's bid, the city de-

195 manded that the company should furnish it water for the period of five days and tendered $85 as a reasonable price therefor. This demand was refused.

While I do not deem the questions raised by this rejection of the company's bill and the tender refused by the company as material to a decision in the case, in the view I entertain as to the essential issues involved and to be decided, still they have been discussed by counsel in their arguments and briefs, and I shall briefly notice them, as they throw some light upon the attitude of these litigants with respect to each other and the conditions from which this controversy results.

The city requested proposals for a supply of water for the term of one to ten years, and the company's bid announced that its offer to supply water on the terms set forth was based upon the

condition that a contract should be awarded to it for ten years. It suggested no offer for a shorter period.

The bid of the company might fairly have justified an inference that it would not be willing to supply water to the city for a less period than ten years. Such an inference, if drawn, under the circumstances existing at the time, might reasonably have led to a conclusion on the part of the city that the water company considered itself in a position to dictate its own terms. I do not mean to be understood, however, as stating that such was the company's intention, or that the city drew such an inference or reached such a conclusion. I simply indicate possibilities in the matter. On the other hand, the demand of the city to be supplied with water
196 for so short a period as five days, even if the sum of $85 tendered was reasonable, which I do not even intimate, was so preposterously inconsiderate in view of the nature of the company's business and its general regulations for supplying water to consumers, that the company might fairly have inferred that the city intended to coerce it to terms by a system of petty harassment of which this demand was the ominous forerunner.

In all probability, however, this action on the part of the city was due to the fact that its officers were in doubt as to whether or not under the section of the charter regulating city contracts, a contract could be entered into for a longer period than five days without advertising for bids.

The first essential issue to be decided, is whether or not under section 13, article VII of the Helena charter, the city can enter into a contract for a water supply in a sum in excess of $100, without advertising for bids. If it cannot, as properly contended by its counsel, the water company, if it furnishes more than $100 worth of water, could not recover for the excess, by reason of the fact that the courts would not recognize a contract entered into by a city which is not authorized by its charter. But this water company has a practical monopoly of all the water available for the needs of the city of Helena and its inhabitants, and is the only possible bidder to respond to an advertised proposal for bids for a water supply. I fail to see the distinction, as applicable to this
197 case, urged by respondent's counsel, between a practical monopoly, that is to say, a monopoly the resultant of pre-existent lawful conditions, but not expressly authorized by law, and a legal monopoly; that is to say, a monopoly expressly granted by law. The test applicable here is whether a monopoly exists, whatever its character.

In Harlem Gas Co. *vs.* Mayor of New York, 33 N. Y. 309, an action brought to recover the price of gas furnished by a company without a contract resulting from an advertisement for bids which a city's charter apparently, just as Helena's charter does, expressly required, the court, on page 325, said:

"In the present case, an adoption of the construction claimed by the municipal authorities would lead to the absurd conclusion that the legislature designed to force a provision into the city charter

compelling the corporation to pay whatever price the sole bidder might choose to exact in his sealed proposals, for the use of property in which he has an absolute monopoly, and in relation to which there can be no competition within the range of legal possibility."

And again, on page 329, is this language:

"The purpose of the statutes is to insure economy in the public administration, and honesty, fidelity, and good morality in the administrative officers. Competitive offers or bids have no other object but to insure economy and exclude favoritism and corruption in the furnishing of labor, se-vices, property and materials for the uses of the city. This was the purpose and the only purpose of the framers of the statutes, and when they have this effect
198 given to them, nothing further is needed. They are not to have such a construction as to defeat this purpose, to impede the usual and regular progress of the public business, or to deprive the inhabitants even temporarily, of those things necessary and indispensable to their subsistence, their health, or the security and protection of their persons or property. Contingencies may arise when services, materials and property above the prescribed value may be immediately needed, and where competitive offers and written contracts would be unserviceable or impossible. In such a case the statutes would not apply, because such application could not have been intended. Whenever the nature of the service or of the property needed for the public uses, lor the time within which it must be had to prevent irreparable mischief under competitive offers is impossible, then the provisions of the acts referred to cannot apply; because such could not have been the intention of the law makers, and such emergencies were not amongst the mischiefs which the provisions referred to were designed to correct."

I adopt the principle announced in this case, and am clearly of the opinion that section 13 aforesaid would not bar a recovery by respondent for water furnished without a contract resulting from an advertisement for bids.

The case of Davenport *vs.* Kleinschmidt, 6 Mont. 502, holding that it was necessary for the city to advertise for bids for a water supply before letting a contract, arose and was decided at a
199 time when there were several different sources from which the city could have obtained the water it needed.

Having thus disposed of this issue as to advertisement, then both parties to this controversy agree that the city has a right to obtain water from the company at a reasonable rate. Respondent maintains, on the one hand, however, that this right results from the terms of a contract set forth in the water ordinance which prescribes that if the city shall desire to purchase water from the company after the expiration of the five years' contract, it may do so, and that the whole matter being strictly one of contract, the question of a public duty imposed upon the company by virtue of its acceptance of its franchise is eliminated, for the reason that mandamus cannot be invoked by one party to a contract to compel its specific performance by another. On the other hand, relator takes the broad

position that by the acceptance of its franchise, the right to exercise a public function was obtained by the company, and that the exercise of this function is a duty imposed by law clearly distinguishable in its nature from the right of an individual to absolutely control property of which he is the owner; and that in a case like this, where no rates are prescribed, upon a demand for a supply of water to the city, it must be complied with by the company at once without any right on the part of the latter to refuse to supply it until a reasonable rate is ascertained and tendered. Almost all the authorities hold that an inhabitant of a city demanding gas or water from a gas company or a water company, and tendering at
200 the same time a prescribed rate, upon being refused can compel a compliance with his demand by mandamus; and as stated by counsel for relator, both the elements of contract and public duty are involved in such a case. The law imposes the public duty and makes a contract in behalf of the would-be consumer who asks relief by mandamus. Consequently, I do not think respondent's counsel can sustain his theory that the question of a public duty is eliminated from the controversy before us. The water ordinance, by its mere expression that the city might purchase water if it so desired, neither added to nor took away the right of the city to obtain water at a reasonable rate from the company, for this right is derived from a contract entered into between the State and the company when it was incorporated. The granting and acceptance of a charter if incorporated always constitutes a contract. Even if the language aforesaid in the water ordinance was more definite, established a more specific contractual relation between these parties than it does, I am satisfied that if the company were to refuse to furnish the city with water under such conditions, that an application for a mandamus to compel it to do so could not be withstood solely on the ground that a contract having been entered into, no question as to a public duty could be considered. The relation of the company to the city, resulting from the public duty owed by the former to the latter, is paramount to any subsequent contractual relation entered into between themselves, whether express or implied. The latter relation is incidental and subservient to the former, and the court so regards it.

201 The decisions on which respondent's counsel rely to prevent the granting of a peremptory writ of mandamus by reason of an existing contract, are explained as follows:

"From the nature of the remedy as thus far disclosed, it is obvious that it relates only to the enforcement of duties incumbent by law upon the person or body against whom the coercive power of the court is invoked. It is not, therefore, an appropriate remedy for the enforcement of contract rights of a private or personal nature; and obligations which rest wholly upon contract, and which involve no question of trust or of official duty, cannot be enforced by mandamus:" High on Extraordinary Legal Remedies, sec. 25, p. 31.

The city, as relator in this action, is not invoking the aid of the court in behalf of its mere individual interests, and I cannot accept

the theory urged by respondent, that the city must be treated as a person or individual seeking to enforce a contract in which it alone, in a private capacity, is interested. Relator represents every one of its inhabitants in this proceeding, appears for them, individually and collectively, and I fail to see how it can be treated as an entity separate and distinct from the aggregate population from which its very existence is derived. In respect to a supply of water for fire and sewerage purposes, it has no interest capable of segregation or apart from the interest of all its inhabitants therein. It might be regarded as possessing such a separate interest as to a supply of water demanded for its city jail building, for instance, such a need
202 being capable of isolation; but when the use is a general one, as for fire or sewerage purposes, in which its need is inextricably mingled with the needs of its citizens, the blending of interests is inseparable.

Even if the city had another remedy in equity or law, as respondent contends it has under our code, the test would then be as to such remedy, barring this proceeding, whether it would be plain, speedy and adequate. What it seeks is an immediate supply of water. It cannot enjoin the company from doing what has already been done; *i. e.*, shutting off its supply of water.

Writs of mandamus and injunction, as is stated in High's Extraordinary Legal Remedies, section 6, possess striking points of resemblance: "Nevertheless," says the author, "an injunction is essentially a preventive remedy; mandamus, a remedial one." Could it recover for damages in any plain, speedy or adequate manner in the event of the buildings in the city being destroyed by fire by reason of their being no water with which to extinguish the flames, or in case of a pestilence generated in sewer pipes which had not been flushed?

Even if there is another remedy, it is obscure, slow and inadequate. The demand is for an instantaneous supply of water, needed, absolutely indispensable, without an hour's delay.

The authorities are almost unanimous that where a duty has been imposed upon a corporation to supply a necessity to the public, it must do so. As applied to gas companies, it is most stringent.

In volume VIII, page 646, American and Railroad Corporation Cases, the author, after a careful collation and résumé of the
203 decided cases between gas companies and private individuals invoking mandamus against them, says:

"Some of these cases are affected by statutes and some lay stress upon the fact that the company in question had an exclusive right to supply the gas; but most of them are decided on common-law grounds, and altogether they firmly establish the rule that a corporation organized for the purpose, or which undertakes to make and distribute gas for public and private use, whether it has an exclusive right or not, is bound to serve the public with impartiality and upon reasonable terms and conditions."

And if such is the rule as to corporations supplying such a need as gaslight only, with how much greater force can it be invoked in

behalf of a necessity for water—water to protect the health and property of the inhabitants of a city?

In the contention that before the city can compel a supply of water it must first tender reasonable rates for the same, however lies the main difficulty I encounter. Where rates have been prescribed, a private person, before he can obtain a mandamus, must tender them. And in all the cases of this class to which I have been cited, such rates have been prescribed and the question of their reasonableness as prescribed conceded. So as to a tender or its equivalent, under such circumstances, there is no difficulty. But here no rates are provided for, and in the absence of such a provision the law declares that the rates to be determined between the parties must be reasonable. As these parties disagree as to what are reasonable
204 rates, necessarily an interval of time, whether long or short, must ensue before such rates can be determined, and the aid of the courts may be invoked by both of these parties before the question is settled.

The answer of respondents sets forth its financial status, avers that the company is in debt and that the rates stated in its bid are the only rates at which it can afford to supply the city with water. The truth of these averments is not necessarily admitted by relator's demurrer; but even if they are and must be accepted as true, they furnish no absolute test for the ascertainment of a reasonable rate.

It appears that as to private consumers in the city the company is limited to certain maximum rates for a period of some fifteen years, and that there is a loss in respect to these rates as well as in respect to a previous supply of water to the city under the five-year contract. Now, if there is a loss in respect to water to be supplied private consumers, certainly in ascertaining a reasonable rate to be paid by the city, the latter has a right to insist that it shall not be required to make good any deficit arising or to arise from supplying private consumers at rates absolutely established for supplying them.

Mr. Justice Thornton, in Water Works *vs.* San Francisco, 82 Cal., on page 329, indicates in a general way, and I think correctly, the method whereby reasonable rates should be reached under the authorities. I quote his language:

"According to this rule, the rates must be fixed so as to allow money to be raised to pay the fairly necessary operating ex-
205 penses of the plaintiff in rendering the service required. In this I include taxes on the property of the plaintiff invested and used in rendering such service as part of such operating expenses.

"In fixing the compensation, regard must be had * * * to the value of the investment of the plaintiff in rendering the service required of it. * * * The obligation does not rest * * * to fix the rates so as to furnish money to the plaintiff to pay the interest on the bonds negotiated by it. If the plaintiff has invested the money borrowed on the bonds in purchasing property used by it in rendering the service due from it, the value of the property, as

said above, must be taken into consideration in fixing the reward or income it is to receive. When the value of such property has been taken into consideration and the compensation fixed in regard to it, to allow rates so as to raise a sum sufficient to pay the interest on the bonds would be to allow compensation for the property bought with the money raised on the bonds, and for interest on such money in addition. This would be to allow for it twice.

"If any portion of the money borrowed on the bonds was not invested in the property, needful, and used in rendering the service required of plaintiff, it would be manifestly unjust to compel the rate payers to pay interest on money so borrowed.

"If the bonds bear too high a rate of interest, the rate payers should not be required to furnish any money; if bound at all to furnish it for such purpose, to pay more than a reasonable rate of interest.

"The above considerations show that the rates should be
206 fixed so as to furnish compensation to the plaintiff based on the amount invested, and not on their bonds or any other debts. * * * And while a fair compensation, considering the value of its investment, should be allowed to the plaintiff, this compensation should be adjusted with regard to the rights of those who have to pay such rates to the plaintiff."

This was a case where a board was authorized to establish rates, but the principle applied in the present action.

The United States Supreme Court in Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S. 362, comments on the principle, and it is also discussed in Ames *vs.* Union Pacific R. Co., 64 Fed. Rep., p. 165.

I cite the language of Judge Thornton and these United States decisions to show what an involved calculation will be required in case of no amicable settlement between these parties as to a reasonable rate, and also to indicate generally the rules under which it must be made.

It is well to emphatically suggest in this connection that the authorities of the city of Helena have no more right to act arbitrarily in the adjustment of these reasonable rates than the company has to insist upon more than the law guarantees it with a due regard for fairness to all concerned. To admit for one moment that either side could be permitted to coerce the other to terms would be abhorrent to the principles of justice for the administration of which courts exist.

The city is solvent. Respondent's counsel says: "We should not be driven to uncertain and tedious litigation after we have
207 furnished the water to ascertain what we will get for it." To this I say, certainly not, and quote Justice Brewer's answer to a somewhat similar objection, on page 394, Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S. 362:

"It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or

destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals."

It is not to be presumed that the City of Helena will deal unfairly with respondent.

I am of the opinion, then, that pending the settlement of these rates respondent must supply the city with water; that this results from the public duty imposed upon it when it accepted its charter from the State and its franchise from the city. To hold otherwise might be practically to declare that by reason of the primal necessity of obtaining this water, the city could not assert its rights and might be compelled by mere stress of circumstances to accede to any terms that might be dictated.

To place the city in such a position with reference to its own creation, a corporation brought into existence to minister to its vital wants, would be contrary to law.

As I view the situation, the main issue being as to the city's
208 right to an immediate supply of water, the company contests for a revenue which the courts will amply protect it in obtaining, the city for the health and property of its inhabitants, pay its own very existence, all of which would be jeopardized if I were to hold otherwise than as I do.

The demurrer is sustained.

HORACE R. BUCK, *Judge*.

Opinion filed February 20, 1895.

JOHN BEAN, *Clerk*,
By G. O. FREEMAN,
Deputy Clerk.

Opinion of Judge Henry R. Buck. Rendered February 20th 1895.

In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Amended Answer.

Now comes the above-named defendant, The Helena Consolidated Water Company, by leave of court first had and obtained, and for amended answer to the affidavit and writ of mandate on file herein, says:

209 I.

1. It admits the allegations in paragraphs one (1) to seven (7), inclusive, of the affidavit on file herein.

2. It denies that the said city duly advertised for bids for supplying the city with water for fire, sewerage and other purposes from and after the 20th day of January, 1895, in accordance with the provisions and conditions of the charter of said city.

3. It admits that said city, prior to the commencement of this proceeding, tendered to this company the sum of eighty-five dollars ($85), for five (5) days' supply of water for fire, sewerage and other purposes of said city, and demanded of this defendant that it furnish a sufficient supply of water to said city for said purposes, but denies that the amount so tendered was reasonable, and alleges the facts to be as hereinafter in this amended answer alleged.

4. Admits that this defendant refused, and still refuses, to supply the water so demanded upon the terms and for the prices tendered by the said city, and refuses to furnish water to said city at a less rate than the rate hereinafter stated, and also refuses to furnish water unless bids for a supply of such water are duly advertised for in accordance with the terms and conditions of the charter of said city, and unless a contract is duly entered into between this defendant and said city for such water in accordance with such charter and advertisement.

5. Denies that this defendant, prior to the passage of the
210 ordinance set forth in said city's affidavit became the owners of all the water rights and water available or adequate to supply the needs of said city and the inhabitants thereof.

6. It denies that this defendant is the only source from which water can be obtained to supply the said city of Helena, with a sufficient supply of pressure of water for fire, sewerage, and other purposes; but it admits that at present it is the only company or person having any franchise which will enable it, or him, to supply said city and the inhabitants thereof with water, and the only one in condition to immediately begin the delivery of such supply.

7. Denies that its bid set forth in said affidavit was, or is, unreasonable or excessive.

And this defendant for a further answer to said affidavit and writ, alleges:

1. That it is now, and at all the times hereinafter stated was, a corporation duly organized and existing under and by virtue of the laws of the State of Montana.

2. That the city of Helena is now, and at all the times hereinafter stated was, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Montana.

3. That on the 15th day of January, 1890, the said City of Helena, by its mayor and common council, duly enacted an ordinance, which is number 284, and a copy of which is attached to the affidavit of plaintiff on file herein, and reference is hereby made to said affidavit, and the same is hereby made a part of this answer.

4. That this defendant duly accepted the terms and condi-
211 tions of said ordinance, and both the city and this defendant have acted under the terms and conditions of said ordinance

from the date thereof up to and including the 20th day of January, 1895.

5. That under and by virtue of its certificate of incorporation, and the terms of said ordinance, this defendant became, and is now entitled to carry on its business in the city of Helena and its vicinity, and to furnish water to the inhabitants of said city at not exceeding the maximum rates fixed by said ordinance, for the period of twenty years from and after the passage of said ordinance, and also to furnish water to said city in case said city desires to purchase the same.

6. That under and by the terms and conditions of said ordinance, maximum rates were agreed upon between this defendant and the said city for furnishing the inhabitants of said city with water.

That since the expiration of said contract set forth in said ordinance, there has been, and now is, no agreement or contract between said city and this defendant for the furnishing of water to said city for fire, sewerage, or other municipal purposes.

7. That it is unreasonable to demand that this defendant furnish water to the city for municipal purposes from day to day and in violation of its reasonable rules and regulations.

That this defendant has duly adopted a rule and regulation that in all cases, unless qualified by special contract, all consumers are required to pay for water for three months in advance, except where meters are used, in which case consumers are required to pay at the end of each month.

212 8. That defendant further alleges that pursuant to the terms of said ordinance, and relying thereon, this defendant has completed a water system and has acquired ample facilities and water to furnish said city and its inhabitants with an abundant supply of water for municipal and other purposes; that said system has actually cost this defendant over the sum of fourteen hundred thousand dollars ($1,400,000); defendant alleges that it is ready and willing to so furnish the same at such prices as will enable this defendant to maintain and operate its plant, pay all its fixed and other necessary charges, and receive a reasonable compensation for the investment of its stockholders in said plant and property.

9. That pursuant to the provisions of said ordinance and contract, the said city directed the erection of two hundred and fifty-eight hydrants upon the mains of defendant in said city, for the purpose of furnishing water to the city. That said city determined that said hydrants were necessary for that purpose.

That defendant is the owner of said hydrants; that the city have used all of said hydrants for fire and other purposes.

That pursuant to the provisions of said ordinance and contract, the city equipped its sewers with flushing tanks, all of which have been supplied with water by defendant.

That it is usual and customary in all cities where the water is furnished by individuals or private corporations in establishing the reasonable value of water furnished for municipal purposes to base the same on a certain price for each hydrant maintained.

213 10. That this defendant has operated its plant in the most economical manner possible since the organization of this company; that it has paid no excessive salaries or other charges, but that every dollar that this company has earned has been properly applied to its plant and the operation thereof. That since the organization of this company, to wit, the 1st day of October, 1889, up to the 1st day of January, 1895, the receipts of this defendant from all sources have been less than its necessary expenditures in the amount of $33,009.58; that its earnings since the first day of January, 1890, to the 20th day of January, 1895, have been less than the actual and necessary disbursements of this defendant in and about said plant, and the operation thereof; that no dividend of any kind, character or description has ever been paid to any of the stockholders of said company since it commenced its operations.

11. That this defendant has not outstanding $949,000 in mortgage bonds; $709,000 of which bears semi-annual interest at the rate of six per cent. per annum; and $240,000 bears semi-annual interest at the rate of five per cent. per annum; that it has a floating indebtedness of $258,200, upon which it is compelled to pay various rates of interest running from seven to ten per cent. per annum; that the operating expenses, taxes, and licenses for the year 1894, have been $18,550.07; that this defendant paid $77,327.24 for interest on its outstanding obligations for the year 1894; that its receipts for the year 1894 from the city under said contract were $24,328.46, and its receipts for said year from all other sources
214 were $89,206.37, leaving a deficit in the treasury of the company of $6,770.94. That all moneys received from its bonds and other sources has been used in the purchase and completion of its plant except such as has been used in paying necessary interest and operating expenses.

12. That the present yearly revenues from the inhabitants of said city at the maximum rates fixed by said ordinance will leave a deficit in the treasury of this defendant of at least $24,000 after this defendant pays all of its fixed charges and operating expenses, and unless it receives a sufficient remuneration from said city to pay this deficit, it cannot operate nor carry on its business, and cannot furnish water to said city of Helena, or its inhabitants; that it cannot increase its charges for domestic services during the next fifteen years without the consent of the city council because of the provisions of said ordinance relative to maximum charges; that it has no other sources of revenue than from the city and its inhabitants.

13. That under and by virtue of the terms and conditions of its charter, from the State of Montana, it is given the power to contract for and sell water to the city of Helena and its inhabitants; that it is willing to sell said water to said city for municipal purposes at such price as will enable defendant to receive a reasonable compensation upon its investment. That eight per cent. per annum is a reasonable compensation upon the investment of the de-

fendant, and that no sum less than this amount would or could be a reasonable compensation.

215 14. That it was ascertained and determined by the said city at the date of the adoption of said ordinance that the revenues which defendant was entitled to derive from the plant as reasonable compensation was properly divisible between the inhabitants of said city in the way or manner therein divided. That a reasonable compensation to be paid by said city, for water for municipal purposes, was one hundred dollars ($100) per year per hydrant for the first two hundred hydrants, and seventy-five dollars ($75) per year per hydrant, for all additional hydrants ordered to be placed by said city. That there has been no change in the conditions since that time which would in any way or manner affect the reasonable value of defendant's services, and that the price then determined to be reasonable is still reasonable.

15. It denies that the amount tendered to this defendant by said city is a reasonable amount for the furnishing of water to the said city, and alleges that the only reasonable amount for such services and water is at the rate set forth herein.

That it cannot operate its plant and furnish said water for a smaller rate or sum without sustaining an absolute loss on its business in each and every year.

16. It alleges that the said City of Helena has no right to fix or establish any rate of payment for water to be furnished by this defendant to said city for municipal purposes.

17. It alleges that there is no duty devolving upon this defendant to furnish water to said city for municipal purposes except

216 under a purchase of said water from this defendant by said city. That this defendant is the owner of all the water brought into said city through its pipes, and has good right and lawful authority to sell and furnish the same.

Wherefore, this defendant asks that the proceedings herein be dismissed.

McCONNELL, CLAYBERG & GUNN,
TOOLE & WALLACE,
Attorneys for Defendant.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

W. A. Chessman, being first duly sworn according to law, deposes and says that he is an officer of The Helena Consolidated Water Company, the defendant herein who makes the foregoing answer, to wit, the president; that he has read said answer and knows the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WM. A. CHESSMAN.

Subscribed and sworn to before me this the 11th day of March, A. D. 1895.

[SEAL.]

O. W. McCONNELL,
Notary Public in and for said County and State.

McCONNELL, CLAYBERG & GUNN,
Attorneys for Defendant.

Answer filed March 14, 1898.

JOHN BEAN, *Clerk*,
By H. J. CASSIDY, *D. C.*

217 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Motion for Writ of Mandate.

Comes now the above-named plaintiff, The City of Helena, and moves the court that a peremptory writ of mandate issue herein as prayed in the petition of the plaintiff, notwithstanding the amended answer of the defendant, which, plaintiff avers, does not state facts sufficient to constitute a defense to the application for the writ.

STEPHEN CARPENTER AND
T. J. WALSH,
Plaintiff's Attorneys.

218 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA *ex Rel.* THE CITY OF HELENA, Plaintiff,
vs.
THE HELENA CONSOLIDATED WATER COMPANY, Defendant.

Order Requiring Water Company to Supply Water.

The above-entitled cause coming on to be heard before the court upon the demurrer of the plaintiff to the answer of the defendant to the petition herein, and the court having heard the argument of counsel in reference thereto, J. B. Clayberg, Esq., and E. W. Toole, Esq., appearing and being heard in behalf of the defendant, and Stephen Carpenter, city attorney, and T. J. Walsh, Esq., appearing and being heard in behalf of the plaintiff, and the court having

taken the matter under advisement and having rendered and filed its decision sustaining the said demurrer, and the said defendant having, by leave of court, filed its amended answer herein, and the plaintiff having thereupon moved the court that a peremptory writ issue herein notwithstanding the said amended answer, and
219 the said motion having been by agreement of counsel submitted to the court without argument, and the court now being fully advised, hereby

Orders, adjudges and decrees, this 23d day of March, 1895, at and during a regular term of the said court, that the said defendant, The Helena Consolidated Water Company forthwith supply and continue to supply the city of Helena with a sufficient quantity and pressure of water for fire, sewerage, and other purposes.

And it is further adjudged that the said plaintiff have and recover of the defendant its costs herein taxed at — dollars.

By the court.

HORACE R. BUCK, *Judge.*

Order filed March 23d, 1895.

JOHN BEAN, *Clerk,*
By H. J. CASSIDY, *D. C.*

(Title of Court, Title of Cause.)

Order Granting Writ of Mandate.

Done in open court this 23d day of March, 1895.

Motion for judgment on the pleadings is granted herein, and peremptory writ is ordered to issue, to which ruling of the court defendant duly excepted.

(Signed) HORACE R. BUCK, *Judge.*

220 *Sheriff's Return.*

STATE OF MONTANA, }
County of Lewis and Clarke. }

OFFICE OF THE SHERIFF.

I hereby certify that I received the within writ of mandate on the 27th day of March, A. D. 1895, and personally served the same on the 27th day of March, A. D. 1895, upon the Helena Consolidated Water Company, by Frank J. Stever, superintendent, defendant, by delivering to said Frank J. Stever, supt. of the Helena Consolidated Water Company, personally, in the said county of Lewis and Clarke, said writ of mandate at the same time showing him the contents thereof.

Dated Helena, Montana, March 27, A. D. 1895.

J. HENRY JURGENS, *Sheriff,*
By FRED E. HOSS, *Under-Sheriff.*

Service	1.00
Mileage	.20
Copy	.40
Total	$1.60

221 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

THE STATE OF MONTANA on the Relation of THE CITY OF HELENA
vs.
THE HELENA CONSOLIDATED WATER COMPANY.

Writ of Mandate.

The State of Montana to the Helena Consolidated Water Company:

Whereas, on the 23d day of March, 1895, it was by the said court ordered that the said The Helena Consolidated Water Company forthwith supply and continue to supply the city of Helena with a sufficient quantity and pressure of water for fire, sewerage and other purposes, and on the said day it was by the said court further ordered that a peremptory writ of mandate issue commanding the said Helena Consolidated Water Company to so supply the said city:

Therefore, we do command you that immediately after the receipt of this writ you forthwith supply, and continue to supply
222 the said city of Helena with a sufficient quantity and pressure of water for fire, sewerage, and other purposes.

Witness, the Honorable Horace R. Buck, judge of the said court, and the seal thereof, this 27th day of March, A. D. 1895.

[SEAL.] JOHN BEAN, *Clerk.*

Copy of writ filed April 17, 1895.

JOHN BEAN, *Clerk,*
By JESS. O. RICKER, *D. C.*

STATE OF MONTANA, }
County of Lewis and Clarke, } *ss:*

I hereby certify that the foregoing is a full, true, correct and compared copy of the original judgment-roll in the case No. 3,026, State of Montana *ex rel. vs.* Helena Consolidated Water Company as the same appears to me of record.

In witness whereof, I have hereunto set my hand and affixed the official seal of this court, this 15th day of August, 1902.

[SEAL.] FINLEY McRAE, *Clerk,*
By REA C. CLEMENTS,
Deputy Clerk.

223 STATE OF MONTANA:

In the Supreme Court, June Term, 1897.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff and Respondent,
vs.
WM. L. STEELE, Mayor of the City of Helena; MASSENA Bullard, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spaulding, Frank J. Dewards, A. McMurphy, A. B. Keith, Jacob Fisher, George O. Freeman, J. Wick, George H. Piatt, E. L. Flaherty, C. G. Stubbs, J. B. Wilson, J. Post, and J. L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants and Appellants. } No. 909.

Opinion.

(Submitted May 28th, 1897; decided June 7th, 1897.)

Statement of the case by the justice delivering the opinion.

224 This is a suit by injunction. It appears from the record that on the 29th day of July, 1895, an election was held in the city of Helena by which the legal voters of said city decided that the city might extend the limit of its indebtedness for the purpose of securing a water supply under the authority of section 6, article XIII of the constitution of the State, and the laws passed in pursuance of such constitutional provision. At a meeting of the city council of said city, after it had been determined by said election that the city might extend its indebtedness for the purpose aforesaid, the city council, by resolution, directed the city clerk to advertise for bids for a supply of water to be furnished to, owned and controlled by said city in accordance with plans and specifications which had theretofore been adopted by said city council. Thereafter the plaintiff water company commenced this suit to restrain the city from receiving bids for said purpose; the plaintiff contending in its complaint that it had established and was maintaining a water system in said city, and that by means of its said system the city had been for a long time furnished, and was then being furnished, with an ample supply of pure and wholesome water, and that under the provisions of subdivision 64 of section 4800 of the Political Code of the State the city was compelled by ordinance to purchase the water system of plaintiff, and had no authority to advertise for bids or to enter into any contract with any other person or persons, corporation or corporations, for a system of water supply for the inhabitants of said city.

The defendants answered, and among other things deny
225 that the city is prohibited from purchasing or supplying itself with another water system for the use of the city and

its inhabitants by the provisions of the law above referred to or by any other law

On a hearing the court issued its order restraining the defendants from advertising for bids for a water plant to be owned and operated by the city of Helena, in accordance with the prayer in the complaint. From this order the appeal is prosecuted.

Opinion of the court by PEMBERTON, chief justice:

There are a number of errors assigned in this record. The action of the court in striking out parts of appellants' answer is complained of. It is contended that the law referred to in the statement was not enacted in accordance with the requirements of the constitution. But we agree with the counsel for respondent that the only question presented for our determination is as to the constitutionality of the last two provisos of subdivision 64 of section 4800 of the Political Code. We shall not, therefore, discuss any minor matters involved, but proceed to an investigation of the real issue presented.

The two provisos involved constitute part of the law in relation to the legislative powers of incorporated cities and towns in this State. They read as follows:

"Provided, that whenever a franchise has been granted to, or a contract made with any person or persons, corporation or corporations, and such person or persons, corporation or corporations in pursuance thereof and in good faith have established and maintained a system of water supply, the city or town granting
226 such franchise, or entering into such contract, before taking any action for the procurement of a water supply to be owned or controlled by such city, or town, shall by the passage of an ordinance give notice to such person or persons, corporation or corporations, that it desires to purchase the plant and franchise of such person or persons, corporation or corporations, it shall have the right to so purchase the said plant upon such terms as the parties may agree; in case they cannot agree, then the said city or town may proceed to acquire the same under the laws relating to the taking of private property for public use.

"Provided, that no city or town having a water supply furnished by private parties, under a contract or franchise entered into or granted by the city or town, shall proceed to the erection or construction of a water plant to be operated by it, but in case the city or town shall desire to own and operate its water supply it shall acquire the plant already in operation therein as herein provided."

Has the legislature, by this enactment, undertaken to impose upon the city of Helena and its inhabitants an obligation unauthorized by the constitution, without the consent and against the will of the city council and the legally constituted authorities of the city?

By the first of these two provisos it became the duty of the city, before taking action to procure a water supply to be owned or controlled by the city, to pass an ordinance notifying the plaintiff, the owner of the water supply system then in operation, that it desired to pur-

chase the plant and franchise of the plaintiff upon such terms
227 as might be agreed upon, and in case of disagreement the city would proceed to acquire the plant of plaintiff by condemnation proceedings. The second proviso makes it absolutely incumbent upon the city, and all cities similarly situated, to purchase whatever water plant or system is in operation and owned by any person or corporation under contract entered into with or franchise granted by the city or town, at the time such city or town decides to procure, own or control a water system of its own. If any city or town desires to own its own water plant or system, this law requires it to purchase whatever water plant or system is owned or controlled by any person or corporation under any contract or franchise entered into with or granted by said city or town. The law compels the city or town to purchase, in one of the ways specified, whatever plant or system that is so owned or controlled in said city or town by any person or corporation under any contract entered into with or franchise granted by said city or town. The city or town has no discretion in the matter. The requirements of the statute are compulsory. To purchase such plant or system necessarily requires the city or town to incur an indebtedness. When an indebtedness is incurred by a city or town it necessarily requires the assessment of taxes upon the property of the inhabitants, and the collection thereof to meet and discharge such indebtedness. Is such indebtedness or obligation such a one as the State has the right to impose upon a city or town, or compel a city or town to assume without its consent? A city or town is bound to do and perform and
228 may be compelled to perform certain public duties. But there are certain local and private obligations and offices which a city or town may or may not perform, and which they cannot be compelled by the State to perform.

Discussing and distinguishing the questions here involved Judge Cooley, in People *ex rel.* Board of Park Comm'rs *vs.* Common Council of Detroit, 28 Mich. 228, 15 Am. Rep. 206, says:

"In People *vs.* Hurlbut, 24 Mich. 44, S. C., 9 Am. Rep. 103, we considered at some length the proposition which asserts the amplitude of legislative control over municipal corporations, and we there concede that when confined, as it should be, to such corporations as agencies of the State, in its government, the proposition is entirely sound. In all matters of general concern there is no local right to act independently of the State; and the local authorities cannot be permitted to determine for themselves whether they will contribute through taxation to the support of the State government, or assist when called upon to suppress insurrection, or aid in the enforcement of the police laws. Upon all such subjects the State may exercise compulsory authority, and may enforce the performance of local duties, either by employing local officers for the purpose, or through agents or officers of its own appointment. The same doctrine was declared in People *vs.* Mahaney, 13 Mich. 481, and in Bay City *vs.* State Treasurer, 23 *id.* 503. It was also recognized in the statement that in the levy of taxes for

purpose of general concern the municipal bodies cannot demand a right to be consulted, and their consent is im-
229 material. And we concur fully in the views which have been expressed by other courts in the cases to which our attention was called on the argument, that as regards duties which the people in the several localities owe to the Commonwealth at large, they cannot be allowed a discretionary authority to perform them or not, as they may choose. Such an authority would be wholly inconsistent with anything like regular or uniform government in the State.

"But we also endeavored to show in People *vs.* Hurlbut, that though municipal authorities are made use of in State government, and as such are under complete State control, they are not created exclusively for that purpose, but have other objects and purposes peculiarly local, and in which the State at large, except in conferring the power and regulating its exercise, is legally no more concerned than it is in the individual and private concerns of its several citizens. * * * We also referred in People *vs.* Hurlbut to several decisions in the Federal Supreme Court and elsewhere, to show that municipal corporations, considered as communities endowed with peculiar functions for the benefit of their own citizens, have always been recognized as possessing powers and capacities, and as being entitled to exemptions, distinct from those which they possess or can claim as conveniences in State government. If the authorities are examined it will be found that these powers and capacities, and the interests which are acquired under them, are usually spoken of as private in contradistinction to those in which the State is concerned and which are called public, thus put-
230 ting these corporations, as regards all such powers, capacities and interests, substantially on the footing of private corporations. This distinction is very carefully drawn in Bailey *vs.* New York, 3 Hill, 531, which concerned the New York water works, and also in Small *vs.* Danville, 51 Me. —, Philadelphia *vs.* Fox, 64 Pa. St. 180, and Western College *vs.* Cleveland, 12 Ohio (N. S.), 375. It is well stated by Lewis, C. J., in Western Saving Fund Society *vs.* Philadelphia, 31 Pa. St. 183, in speaking of a municipal corporation as the owner of gasworks. 'The supply of gaslight,' he says, 'is no more a duty of sovereignty than the supply of water. Both of these objects may be accomplished through the agency of individuals or private corporations, and in very many instances they are accomplished by these means. If this power is granted to a borough or a city, it is a special private franchise, made as well for the private emolument and advantage of the city as for the public good. The whole investment is the private property of the city; as much so as the houses and lands belonging to it.'"

Upon the same question Chief Justice Breese, in People *ex Rel.* McGagg *et al. vs.* The Mayor *et al.* of Chicago, 51 Ill. 17, 2 Am. Rep. 278, a case involving the question as to whether the city of Chicago could be compelled without its consent to assume a local indebtedness, said:

"If the principle be admitted that the legislature can, uninvited, of their mere will impose such a burden as this upon the city of Chicago, then one much heavier and onerous can be imposed—in short no limit can be assigned to legislative power in this
231 regard. If this power is possessed, then it must be conceded that the property of every citizen within it is held at the will and pleasure of the legislature. Can it be that the General Assembly of the State, just and honest as its members may be, is the depositary of the rights of property of the citizens? Would there be any sufficient security for property if such a power was conceded? No well-regulated mind can entertain the idea that it is within the constitutional competency of the legislature to subject the earnings of any portion of our people to the hazards of such legislation.

"We fail to perceive any real difference, in principle, in forcing this burden upon the city, and imposing a like burden by the direct action of the legislature upon individual property owners within it, for in both cases the debt at maturity must be paid by such holders, while the accruing interest is a constant drain upon their resources.

"No case, amid the multitude which have been cited by the relators, goes to the extent of this, and with our understanding of the constitution, no warrant is found there for such legislation. Rather than attempt to compel submission to such a law, surely the alternative should be presented to the city, to be deprived of its corporate franchises, for cases, if such legislation is sanctioned, may arise where a city would prefer such deprivation in preference to incurring a debt which might prove greatly detrimental to their prosperity, or wholly ruinous."

232 Judge Breese was discussing the power of the legislature to impose these local burdens or debts upon cities or towns under the constitution of Illinois, and concludes that the legislature has no such power.

Section 5, article 9 of the Illinois constitution, under which the decision referred to was rendered, gave the power to cities and towns to assess and collect taxes for corporate purposes.

The provision of our constitution upon the subject is as follows: "The Legislative Assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes." (Sec. 4, art. XII, Constitution.)

It will be seen that our constitutional provision is much stronger, and goes much further in favor of the powers of cities and towns to assess and collect municipal taxes than does the Illinois constitution. Our constitution says the legislature shall not levy taxes upon the inhabitants or property in any city or town for municipal purposes. It cannot be disputed that the indebtedness sought to be imposed upon the cities and towns by the legislation under discussion, without their consent, is for local municipal purposes. Nor can it be disputed that to compel the city of Helena, and other cities and

towns, to assume such indebtedness against its will by this legislation also compels the assessment and collection of taxes by the city against its will for the purpose of paying this compulsory indebtedness.

233 Speaking of such legislation, Judge Cooley, in People *ex rel.* Board of Park Comm'rs *vs.* Common Council of Detroit, *supra*, says: "The constitutional principle that no person shall be deprived of property without due process of law applies to artificial persons as well as natural, and to municipal corporations in their private capacity, as well as to corporations for manufacturing and commercial purposes. And when a local convenience or need is to be supplied in which the people of the State at large, or any portion thereof outside the city limits, are not concerned, the State can do no more, by process of taxation, take from the individual citizens the money to purchase it, than they could if it had been procured, appropriate it to State use. To this extent the corporate right appears to us to be a clear and undoubted exception to the general power of control which is vested in the State.

"Whoever insists upon the right of the State to interfere and control by compulsory legislation the action of local constituency in matters exclusively of local concern should be prepared to defend a like interference in the action of private corporations and of natural persons. It is as easy to justify, on principle, a law which permits the rest of the community to dictate to an individual what he shall eat, and what he shall drink, and what he shall wear, as to show any constitutional basis for one under which the people of other parts of the State, through their representatives, dictate to the city of Detroit what fountains shall be erected at its expense for the use of its citizens, or at what cost it shall purchase and how it

234 shall improve and embellish a park or boulevard for the recreation and enjoyment of its citizens. The one law would rest upon the same fallacy as the other, and the reason for opposing and contesting it would be the same in each case."

Upon this subject Chief Justice Breese, in People *vs.* Mayor *et al.*, of Chicago, *supra*, says: "So sensibly impressed were the framers of our Constitution of the liability of legislative bodies to incur debts, sometimes for objects not entirely praiseworthy or useful, and the hazards, losses, and disturbances to which they lead, that they interposed the power of the people at the very threshold to prevent this danger—to tie up the hands of the legislature on this subject—to divest it of a power which dear-bought experience has satisfied the people should not be left unrestrained.

"The burden imposed by this law upon a fractional part of this State is tenfold heavier than the legislature can impose upon the people of the whole State, without their previous consent, manifested by a vote at a general election. In view of this wise and salutary provision of the constitution, can it be seriously contended that the legislature can exercise the assumed power to force one and all the municipalities of the State to incur debts amounting to millions of dollars by one dash of the legislative pen, for corporate purposes,

when, to meet the most urgent demands of the public, and provide for the general welfare, they cannot create a debt against the State exceeding the sum of $50,000? The proposition is so incon-
235 sistent with the spirit and plain intention of this provision that it can receive no favor in this court.

"How can we hold, in view of the protection this clause was designed to give the people of the whole State, that the people of a particular municipality can be subjected to a corporate debt without the consent either of the people to be taxed or of their corporate authorities?

"The protection of the whole implies, necessarily, the protection of all its organized parts, and the whole cannot be secure while all or any of its parts are exposed to danger. What is the real value of this provision of the constitution, if the legislature inhibited from incurring a debt beyond $50,000 on behalf of the State, may force a debt tenfold or one hundred fold greater, for there is no limit to the power, upon all the cities of the State? We can perceive none. Where these municipalities become so indebted by compulsion of the legislature, the whole State in its real and substantive, if not in its corporate, body, will in truth and in fact be the debtor, for the same power of coercion can be applied to counties and towns, and, as the State is made up of cities, counties and towns, the whole State may thus become involved. This provision then, would be no restriction upon the power to create a debt beyond a certain amount, and would fail of its purpose of protecting the State and its citizens from oppressive burdens. Those citizens who are to be affected by the debt should certainly have some voice in its creation, on the same principle that the people of the whole State are to express their consent, by a vote, to the creation of a debt affecting them and their material interests."

These two decisions from which we have quoted so largely,
236 delivered by two of the ablest jurists that this country has produced, are leading cases upon the questions involved in this appeal. These two distinguished judges declare that the cases have been exhaustively argued by the best lawyers of the respective States. These cases are in our judgment absolutely conclusive of the one question presented by this appeal—namely, the constitutionality of the compulsory statute under which this action is prosecuted. See, also, People *ex rel.* Dunkird *et al. vs.* Batchellor, 53 N. Y., 128, 13 Am. Rep., 480; Dillon's Municipal Corporations, vol. 1, sec. 72 *et seq.* (4th ed.).

It is contended by appellants that the law in question is void, because in violation of section 13, article XV of the constitution, in that "it imposes on the people of the city a new liability in respect to transactions or considerations already passed."

At the time of the enactment of this law the city was under no obligation to buy the plaintiff's water plant. The fact that the plaintiff had established, was the owner of and was controlling and operating its plant under the contract with, or franchises granted by the city, at the time of the enactment of the law, constituted no

valid consideration for this compulsory indebtedness. If this constituted a consideration it was passed. Under the contract or franchise upon which the plaintiff bases its right of action the city reserved the right to enter into contracts with and purchase water from any other person or corporation for city purposes. The city, so far as shown, has never at any time assumed any sort of obligation to purchase plaintiff's plant.

237 It is contended that the moral obligation of the city to assume this compulsory indebtedness is sufficient to support the law and relieve it of its unconstitutionality if it be in conflict with the constitution.

But we are unable to see what moral obligation the city is under or has ever assumed that would bring the law under the rule contended for by counsel for respondent. The city never agreed to continue for all time to buy water of the plaintiff; it expressly reserved the right to do otherwise. Plaintiff's plant may not be capable of furnishing an ample supply of wholesome water for the inhabitants of the city, either now or as the city may expand and increase in population in the future. The plant and system may be practically worthless. It may be so involved in debt and encumbered that the plaintiff could convey no title for any sum proportionate to its real value. To purchase the plant might so increase the indebtedness of the city as to exceed the constitutional limit, or, at any rate, so as to become ruinous to the inhabitants of the city. The city may be able to procure a water system and supply for half what plaintiff's plant would cost. Is there any such moral obligation on the part of the city disclosed in this case as would justify this court in compelling it to assume the indebtedness necessary for it to assume in order to purchase plaintiff's plant and tax the people for the money to meet such indebtedness in total disregard of all these possible and probable events? Shall it be said in obedience to this law that the city authorities—the legal representatives of the inhabitants of the city—have no discretion in the

238 premises but must obey notwithstanding disaster and oppressive taxation and ruin may come upon the people as a consequence.

We think the two provisos of the law under discussion are in violation of the clauses of the constitution quoted and referred to above, as well as the spirit of our governmental system which recognizes "that the people of every hamlet, town and city of the State are entitled to the benefits of local self-government." The law is not supported by any moral obligation, but is rather a violation of law, equity, the constitution as well as the principle of moral obligation invoked by the respondent. It violates the general rule of the law that the consent of parties to a contract is essential to its validity, whether the parties be natural or artificial persons. We are at a loss to find any theory of law, equity or justice upon which we can conscientiously sustain the constitutionality of the statute in question.

The judgment and order appealed from are reversed and the

cause remanded with directions to dissolve the injunction and dismiss plaintiff's complaint.

W. Y. PEMBERTON,
Chief Justice.

We concur:
WM. H. HUNT,
Associate Justice.
HORACE R. BUCK,
Associate Justice.

239 STATE OF MONTANA:

I, Henry G. Rickerts, clerk of the supreme court of the State of Montana, hereby certify that the foregoing is a full, true and correct copy of the opinion filed by the supreme court of the State of Montana, on the 7th day of June, 1897, in case No. 909. Helena Consolidated Water Company, respondent, *vs.* Wm. L. Steele, mayor of the city of Helena *et al.*, appellants.

[SEAL.] HENRY G. RICKERTS,
Clerk of the Supreme Court of the State of Montana,
By WILLIAM H. CURTIS,
Deputy Clerk.

And thereafter, to wit, on the 20th day of August, 1902, amendment to agreement upon facts was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Amendment to Agreement upon Facts.

It is also stipulated that the attached is a correct copy of
240 the answer, after striking out that portion thereof by order of court, on motion of plaintiff, ordered stricken out, in the action referred to in the 8th paragraph of the agreed statement of facts herein; and it is also further stipulated that this amendment be added to and form a part of the 8th paragraph of said original stipulation.

Dated August 20, '02.

CLAYBERG & GUNN AND
CARPENTER & CARPENTER,
Solicitors for Complainant.
EDWARD HORSKY,
R. LEE WORD, AND
TOOLE & BACH,
Solicitors for Defendant.

241 In the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke.

HELENA CONSOLIDATED WATER COMPANY, Plaintiff,

vs.

WILLIAM L. STEELE, Mayor of the City of Helena; MESSENA BULLARD, City Clerk of the City of Helena; John B. Sanford, Wm. S. Spalding, Frank J. Edwards, Augustus McMurphy, Adelphus B. Keith, Jacob Fischer, George O. Freeman, John Wick, George H. Piatt, Edward L. Flaherty, Charles G. Stubbs, John B. Wilson, Jacob Post, and Jacob L. Walker, Comprising the City Council of the City of Helena, and The City of Helena, Defendants.

Answer.

Now come the above-named defendants, and for answer to the plaintiff's complaint heretofore filed in said cause—

242 I. Admit the allegations contained in paragraphs I, II, III and IV of the plaintiff's complaint.

II. Admit that the defendant is a taxpayer of the city of Helena; but deny that plaintiff's alleged water system or supply will be irreparably or otherwise damaged or injured by any act of the defendants alleged in the complaint.

III. Admit that in the month of July, 1895, there was submitted to the taxpayers of the city of Helena the proposition of extending the constitutional limit of the indebtedness of said city for the purpose of acquiring a water supply by purchase, which water supply should be the property of the city of Helena; and admit that a vote was had upon said proposition at said election; but the defendants deny that by said vote the city council was directed to proceed to acquire its own water system and supply, or to issue bonds in payment therefor; but the defendants allege that by said vote at said election the said city was given the option to acquire such supply as it saw fit.

IV. Admit the enactment and passage of ordinances numbered 95 and 248 by the city council of the city of Helena as alleged in the complaint; but the defendants deny that the plaintiff, or its predecessors in interest, proceeded to establish or maintain, or has for over five years, or any other time last past, established or maintained a system of water supply in said city; and deny that the said plaintiff corporation has furnished to the city of Helena or the inhabitants thereof an ample supply of pure or wholesome water; deny that it is now maintaining a water supply or furnishing

243 an ample supply of pure or wholesome water to said city or its inhabitants as alleged in the complaint; and admit that the franchise granted by ordinance numbered 248 to the plaintiff corporatien will continue in force before its expiration for a number of years to come.

V. Admit the allegations of paragraph VIII of the complaint.

VI. Deny that immediately after the determination of the said election of July, 1895, or at any other time, it became or was the duty of the city council of the city of Helena to notify this plaintiff by the passage of an ordinance, or in any other manner, save as hereinafter alleged, of its desire to purchase plaintiff's or any other water system; and deny that the city council of the city of Helena has taken no steps or action looking to the acquisition of a water supply, or neglects, fails, or refuses so to do.

VII. Admit the allegations contained in paragraph X of the complaint.

VIII. Deny that the plaintiff as a taxpayer or otherwise, is directly, or otherwise, injured by said proceeding of the city council as alleged in the said complaint.

IX. Deny that under or by virtue of any law of the State of of Montana the city has no power, right or authority to purchase, own or control any water system or water supply save or except that claimed by the plaintiff to be now owned and maintained by it.

X. Deny that the said city, acting by or through its council and other officers, threatens to enter into a contract to purchase a water supply, pursuant to the terms of said advertisement, from
244 any person or corporation other than the plaintiff; deny that it threatens or will unless restrained by this court receive or accept the proposition or propositions to enter into a contract with the maker of any proposition to purchase a water supply in violation of any law of the State of Montana to the injury of this plaintiff as a taxpayer or of its property in the manner alleged in the complaint, or otherwise or at all.

XI. Deny that the plans and specifications adopted by the city council specified in its proposed advertisement for bids for a water supply were prepared or adopted fraudulently or for the purpose of preventing this plaintiff making any bid thereunder or competing with any other person or corporation in the sale of a water supply to the said city; and deny that the said plans and specifications were adopted for the express or other purpose of preventing said city from purchasing a plant or system of this plaintiff or for the express purpose of enabling said city to cause to be constructed or to purchase a water system other than that owned by the plaintiff as alleged in the complaint. And deny that the said plaintiff can not become a bidder under said advertisement, or that it cannot compete on said bids, for the reason that its plant and system does not comply with the plans and specifications adopted by the city council, or that said plans and specifications are such that there can be no competition of bidding, or that it would be impossible thereunder for the city to accept the lowest responsible bid.

XII. Deny that all or any of the acts or intended acts of
245 the defendants are without authority of law or illegal, or that they will cause great or irreparable or any injury to this plaintiff or its property.

XIII. Deny that the plaintiff or its property is damaged or injured by any act or intended act of the defendants whatsoever as alleged in said complaint, or otherwise or at all.

Wherefore, the defendants pray that by order of this court the plaintiff and its officers, agents, attorneys, counselors, servants and employees, and all persons acting or claiming to act by, through, or under it, may be forever enjoined and restrained from in any manner interfering or attempting to interfere with the defendant city, or its council, or agents or officers in their efforts and endeavors to procure and obtain an ample and sufficient and adequate supply of pure and wholesome water for the inhabitants of the city and its own uses.

MASSENA BULLARD,
City Attorney.
TOOLE & WALLACE AND
H. G. & S. H. McINTYRE,
Attorneys for Defendants.

STATE OF MONTANA, } ss:
County of Lewis and Clarke, }

George O. Freeman, being duly sworn, deposes and says: That he is an officer of The City of Helena, one of the defendants named in the above-entitled action, to wit, an alderman of said city, and as such makes this verification for and in its behalf; that he has read the foregoing answer and knows the contents thereof, and
246 that the matters and things therein stated are true to the best knowledge, information, and belief of affiant.

G. O. FREEMAN.

Subscribed and sworn to before me this 2d day of January, 1896.

CHAS. A. SPAULDING,
Notary Public, Lewis and Clarke County, State of Montana.

(Endorsed:) Title of court and cause. Amendment to agreement upon facts. Filed August 20th, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy.

And thereafter, to wit, on the 20th day of August, 1902, an order for final decree was made and entered, which is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order for Final Decree.

This cause came on regularly for hearing upon an agreed statement of facts. Messrs. Clayberg & Gunn and Carpenter & Carpenter appearing for the complainant, and Messrs. Edward Horsky, Esq., Word & Word, and Toole & Bach appearing for defend-
247 ant, and after argument of counsel cause submitted; and after due consideration it was ordered and decreed that the defendant be restrained from constructing a water plant to supply the citizens of Helena, Montana, with water.

Done in open court August 20th, 1902.

And thereafter, to wit, on the 21st day of August, 1902, a final decree was duly signed and entered, which is entered of final record as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Final Decree.

This cause came on to be heard at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows: That the writ of injunction heretofore issued in this cause be, and the same is, hereby made permanent, and that the said defendant, its officers and agents, and each and all thereof, be, and they are hereby, enjoined and restrained from acquiring a water plant, system or supply (other than the plant, system and supply of complainant) to be owned or con-
248 trolled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by ordinance No. 248 of the ordinances of said city, to wit, January 15th, 1910.

And it is further ordered, adjudged, and decreed that said complainant recover its costs herein, taxed at the sum of — dollars.

Dated this 21st day of August, A. D. 1902.

HIRAM KNOWLES, *Judge.*

(Endorsed:) Title of court and cause. Final decree. Filed and entered August 21st, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy clerk.

And thereafter, to wit, on the 21st day of August, 1902, an order was made allowing exceptions to final decree, which order is as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY
vs.
THE CITY OF HELENA. } No. 619.

Order Allowing Exceptions to Final Decree.

Upon court signing the final decree and announcing same,
249 counsel for defendant thereupon filed written exceptions thereto, and thereupon the court signed a written order allowing same.

Done in open court, August 21st, 1902.

And thereupon, to wit, the 21st day of August, 1902, exceptions to final decree were filed, which said exceptions are as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Exceptions to Final Decree.

And now comes the defendant and files this, its objections and exceptions to the decree in favor of complainant, and especially that portion thereof enjoining and restraining said defendant from constructing, putting in and completing its contemplated water works and system, at any time it may deem it proper and expedient to do so; and ask that said restraining order be limited and confined to
the sale, distribution, or furnishing of water to the citizens
250 and inhabitants of the said city, during the existence and life of the said ordinance No. 248, or until permitted so to do by the court.

Dated August 21, 1902.

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

(Endorsed:) Title of court and cause. Exceptions to decree. Filed August 21st, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy clerk.

And thereafter, to wit, on the 21st day of August, 1902, a bill of exceptions was duly allowed, signed and filed, and which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Bill of Exceptions.

Be it remembered at the argument of this suit upon the issues joined, the agreed statement of facts and exhibits thereto
251 attached, it was insisted that if any decree was rendered and passed in favor of complainant that *that* the decretal order therein be limited to the sale, distribution or furnishing of water by said city under its contemplated plant, to the citizens and inhabitants of the said city, and that said city be permitted to exercise its business function and discretion in constructing, putting in, and completing its water system and plant at any time it may deem advisable and feasible to do so, and that said injunction be so limited accordingly, and upon the presentation of said decree said defendant objected and excepted thereto, for that the same should be limited as aforesaid, so as to allow the said defendant to construct, put in, and complete, said water works and plant for the purpose of furnishing and supplying both the said city and inhabitants at any time it may deem it advisable and feasible, and that such injunction and restraining order be confined to the sale, distribution or furnishing of water to said citizens and inhabitants, if any decree is signed and passed in favor of said complainant.

And the court, notwithstanding such objections and exceptions, and request for modification and limitation of said injunction, rendered and passed the decree herein, to which decree, as well as the refusal to limit and modify as aforesaid, defendant excepted; and this, its bill of exceptions, is, at the time, and in open court, signed, sealed, and made a part of the record herein.

Dated August 21, 1902.

HIRAM KNOWLES,
Judge of said Court.

252 (Endorsed:) Title of cause and court. Bill of exceptions. Filed and entered August 21st, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

And thereafter, to wit, on the 22d day of August, an assignment of errors was filed herein, which is entered in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the State of Montana. In Equiiy.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Assignment of Errors.

The defendant files the following assignment of errors upon which it will rely upon its appeal from the decree of the court, and decretal order therein contained, granting an injunction herein in favor of complainant and against defendant in the above-entitled cause, on the 21st day of August, A. D. 1902, viz.:

1. The court erred in overruling the defendant's plea to the jurisdiction to the complainant's bill herein. For that the State court had acquired jurisdiction over the subject matter, by pro-
253 ceedings under the law of eminent domain, and actions commenced in said court for the purpose of enjoining defendant from expending any money for the purposes mentioned in the complaint herein, which were and are still pending in said court, and for the causes and reasons set out in said plea.

2. The court erred in overruling refendant's demurrer to the complainant's bill herein. For that said bill of complaint is multifarious in that it comprises two separate and independent causes of suit, one upon an alleged contract, and the other as a taxpayer of said city. Improperly unites a suit arising upon a contract, and one arising upon an alleged tort; and for that said complaint does not state facts sufficient to authorize an injunction herein, or to entitle complainant to any relief whatever, and for the causes set out in the said demurrer.

3. The court erred in entering and rendering any decree or injunction in favor of complainant, and against defendant under the pleadings, agreed statement of facts and exhibits made a part thereof, for the reason that no contract, express or implied, is shown under said ordinance 248, or otherwise, nor was there any legal or equitable obligation of duty shown on the part of the defendant by which it has granted away, or in any manner deprived or disabled itself from constructing, putting in and completing its water system or plant, at any time it saw proper to do so, in the exercise of its business functions, and discretion, and powers under the constitution and laws of the State of Montana; nor has it in any manner, during the existence of said ordinance, ceded away or de-
254 prived itself of the right and power to furnish and supply the citizens and inhabitants of said city with water.

4. The court erred in not limiting and confining said decree and injunction, to the sale, distribution, and furnishing of water to the inhabitants of said city, for that there is no contract, obligation, or duty, express or implied, that said defendant will not in the mean time, when it sees proper and deems it expedient to do so, construct, put in and complete said water system and plant, so as to have the same available and ready for use for all lawful purposes, at the expiration of the term of said ordinance and franchise to complainant.

5. Because under said pleadings, agreed statement of facts, and exhibits thereto attached, said complainant neither in its own right or as a taxpayer, was or is entitled to said decree or injunction, or any relief whatever for that it clearly and indisputably appears that all the contemplated proceedings and doings of said defendants in constructing, putting in, and completing said water system and plant, and all expenditures to be made in connection therewith, are to be, and will be, in strict accordance with the constitution and laws of said State, and that there is no threatened illegal or unlawful act or acts to be enjoined or restrained.

6. The court erred in not modifying and limiting said decree and injunction therein contained, as requested by defendant, and which will more fully appear by its bill of exceptions, signed, sealed and made a part of the record herein, on the 21st day of August, A. D. 1902, and to which reference is hereby made.

255 7. The court erred in not holding that the judgment in the case of The Helena Consolidated Water Company (the predecessor in interest of complainant) *vs.* William L. Steele, *et al.*, was not *res judicata* and conclusive of the right and title relied upon by complainant herein, for that it appears that the rights, duties and obligations imposed by said ordinance were prior and superior to said mortgage and all rights thereunder, and it was and is subject to the construction and interpretation given said ordinance by the court in the case aforesaid, wherein and whereby it was necessarily and actually determined, that complainant, neither as a taxpayer or otherwise, is or was entitled to the rights now and here claimed by it; said judgment being rendered without fraud or collusion, and the presumptions therefrom being unrebutted, all of which appears by the pleadings, exhibits and agreed statement of facts.

8. The said judgment not being in any way impeached or assailed for fraud or collusion or otherwise, and being in full force and effect and unrebutted, was and is conclusive of the rights of complainant as such successor and privy as to all matters therein actually or necessarily determined, among which were, that said complainant's predecessor and privy was not, as a taxpayer, or under said ordinance 248, or under said unconstitutional act of said Legislative Assembly, entitled to any relief whatever, and for that said action was dismissed upon its merits, and necessarily and actually determines all the questions here involved, adversely to any claim of complainant that would entitle it to the relief granted, or any relief whatever.

256 9. Because it appears from the pleadings, agreed statement of facts and exhibits, that the rights adjudged to complainant and necessary to support said decree and injunction, and any and all contractual obligations or duties to that effect under said ordinance, are in contraversion of the constitution of said State and laws passed in pursuance thereof, and that if any such obligations or duties ever existed under any contract, or obligation express or implied the same terminated and expired five years after the adoption and approval of said ordinance since which time the duties, obligations and liabilities are of a public nature, and such as are imposed and grow out of the franchises and privileges granted and none other.

10. The court erred in not rendering judgment for defendant in not dismissing said complainant's bill of complaint, upon the issues presented by the pleadings, agreed statement of facts and exhibits, for that, as matter of law, it thereby appears that there is no equity or right in the complain-t entitling it to any relief, and that defendant was and is entitled to do and perform the acts and things contemplated and intended to be done and performed by it.

In order that the foregoing assignment of errors may appear of record, the defendant presents the same to the court, and prays that such disposition be made thereof as in accordance with the
257 law and statutes of the United States in such cases made and provided.

All of which is,
Respectfully submitted,

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Assignment of errors. Filed and entered August 22d, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

258 And thereafter, to wit, on the 22d day of August, 1902, the petition for appeal and order allowing same were filed and entered, which are in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Petition for Appeal and Order Allowing Same.

The above-named defendant, conceiving itself aggrieved by the decree made and entered on the 21st day of August, A. D. 1902, in the above-entitled cause, does hereby appeal from said order and decree to the United States circuit court of appeals for the ninth circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon
259 which said order was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

Dated August 21, 1902.

EDWARD HORSKY,
TOOLE & BACH,
R. LEE WORD,
Solicitors for Defendant.

The foregoing claim of appeal is allowed.
Dated August 22d, 1902.

HIRAM KNOWLES,
Circuit Judge.

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted, this 22d day of August, A. D. 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

260 And thereafter, to wit, on the 22d day of August, 1902, the bond on appeal, duly approved, was filed herein, which is in the words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant. } No. 619.

Bond on Appeal.

Know all men by these presents, that we, The City of Helena, a municipal corporation situated in the county of Lewis and Clarke, State of Montana, organized and existing under and by virtue of the laws of said State, as principal, and John Horsky and F. J. Edwards, residing in said city of Helena, Lewis and Clarke county, State of Montana, as sureties, are held and firmly bound unto the above-named complainant, The Helena Water Works Company, in the full and just sum of five hundred dollars, to be paid to the said Helena Water Works Company, its attorneys, successors or assigns, for which payment, well and truly to be made, we bind our-
261 selves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this twenty-second day of August, in the year of our Lord one thousand nine hundred and two.

Whereas, lately at a session of the circuit court of the United States, ninth circuit, in and for the district of Montana, in a suit pending in said court between the said Helena Water Works Company, complainant, and said City of Helena, respondent, a decree was entered against the said City of Helena, and the said City of Helena, having obtained from said court an order allowing an appeal to the United States circuit court of appeals, for the ninth circuit, to reverse the decree of the aforesaid suit, and a citation directed to the said Helena Water Works Company is about to be issued, citing and admonishing it to appear at the United States circuit court of appeals, for the ninth circuit, to be holden at San Francisco, California.

Now, the condition of the above obligation is such that if the said City of Helena shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation is to be void; otherwise to remain in full force and virtue.

THE CITY OF HELENA,
By EDWARD HORSKY,
City Clerk and Attorney.
JOHN HORSKY.
F. J. EDWARDS.

262 DISTRICT OF MONTANA, } ss:
United States of America, }

F. J. Edwards and John Horsky, being duly sworn, each for himself deposes and says: That he is a resident of the State of Montana; that he is one of the sureties to the foregoing undertaking; that he is worth the sum specified therein as the penalty thereof, over and above his just debts and liabilities, and exclusive of property exempt by law from execution.

F. J. EDWARDS.
JOHN HORSKY.

Subscribed and sworn to before me this 22d day of August, A. D. 1902.

[SEAL.] CHARLES E. PEM,
Notary Public in and for Lewis and Clarke County, State of Montana.

The foregoing bond, and sufficiency of sureties on said bond, are hereby approved this 22d day of August, A. D. 1902.

HIRAM KNOWLES, *Judge.*

Due service of the foregoing instrument and receipt of a true copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CLAYBERG & GUNN,
Solicitors for Complainant.

(Endorsed:) Title of court and cause. Bond on appeal. Filed and entered August 22d, 1902. Geo. W. Sproule, clerk. By F. H. Drake, deputy clerk.

263 And thereafter, to wit, on the 22d day of August, 1902, citation duly issued, which said citation is hereto annexed:

In the Circuit Court of the United States, Ninth Circuit, in and for the State of Montana. In Equity.

THE HELENA WATER WORKS COMPANY, Complainant, } No. 619.
vs.
THE CITY OF HELENA, Defendant. }

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Helena Water Works Company, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be

holden at the city of San Francisco, in the State of California, on the 6th day of October next, pursuant to an order allowing an appeal entered in the clerk's office of the circuit court of the United States for the district of Montana, in that certain action numbered 619, in which you, the said Helena Water Works Company,
264 are complainant and appellee, and the said City of Helena is respondent and appellant, to show cause, if any there be, why the decree rendered against the said respondent and appellant, The City of Helena, as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hiram Knowles, judge of the United States circuit court, ninth circuit, in and for the district of Montana, this 22d day of August, A. D. 1902.

HIRAM KNOWLES,
Circuit Judge.

Service of the within citation and receipt of a copy thereof are hereby acknowledged and admitted this 22d day of August, 1902.

CARPENTER & CARPENTER AND
CLAYBERG & GUNN,
Solicitors for The Helena Water Works Company, Complainant and Appellee.

(Endorsed:) No. 619. In the circuit court of the United States, ninth circuit, district of Montana. The Helena Water Works Company, plaintiff, *vs.* The City of Helena, defendant. Citation. Filed and entered August 22, 1902. Geo. W. Sproule, clerk. By Fred H. Drake, deputy. Toole & Bach, of counsel for defendant.

265 And thereafter, to wit, on the 23d day of August, 1902, a præcipe for transcript was filed, which is in the words and figures as follows:

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

THE HELENA WATER WORKS COMPANY, Complainant,
vs.
THE CITY OF HELENA, Defendant.

Præcipe for Transcript.

To the clerk of the above-entitled court:

Please prepare transcript on appeal of the answer, amendment to bill of complaint, agreement upon facts, amendment to agreement upon facts, assignment of errors, bill of complaint, bill of exceptions, bond on appeal and order approving, citation, demurrer, exceptions to decree, final decree, order overruling demurrer and plea, order as

to refiling replication, order allowing papers to be annexed to agreement upon facts, order for final decree, order allowing bill of exceptions, plea, petition for appeal and order allowing, replication, subpœna in equity, stipulation allowing amendment to bill,
266 stipulation as to agreed statement of facts as appears from the original records and files of said cause in said court.

Dated August 22d, A. D. 1902.

EDWARD HORSKY,
TOOLE & BACH, AND
R. LEE WORD,
Solicitors for Defendant.

Clerk's Certificate to Transcript.

UNITED STATES OF AMERICA, } ss:
District of Montana, }

I, George W. Sproule, clerk of the United States circuit court for the district of Montana, do hereby certify and return to the honorable, the United States circuit court of appeals for the ninth circuit, that the foregoing volume, consisting of 245 pages numbered consecutively from 1 to 245, is a true and correct transcript of the pleadings, process, orders, decree, agreed statement of facts and all proceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of seventy-seven and 45-100 ($77.45) dollars, and has been paid by the appellant.

267 In witness whereof, I have hereunto set my hand and affixed the seal of the said United States circuit court for the district of Montana, at Helena, Montana, this 25th day of August, A. D. 1902.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By FREDERICK H. DRAKE,
Deputy Clerk.

(Endorsed:) No. 891. In the United States circuit court of appeals for the ninth circuit. The City of Helena, appellant, *vs.* The Helena Water Works Company, appellee. Transcript of record. Appeal from the circuit court of the United States for the district of Montana. Filed September 2, 1902. F. D. Monckton, clerk.

268 At a stated term, to wit: the October term A. D. 1902 of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco,

on Thursday the ninth day of October in the year of our Lord one thousand, nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE CITY OF HELENA, Appellant,
—
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Order of Submission.

Ordered, appeal argued by Edward Horsky, Esquire, counsel for the appellant, and Milton S. Gunn, Esquire, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel for the appellant to file reply-brief within five (5) weeks from date, counsel for the appellee being granted leave to file supplemental brief.

269 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
vs.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Appeal from the circuit court of the United States for the district of Montana.

This action was commenced in the United States circuit court for the district of Montana, on April 12, 1901, by the Helena Water Works Company, a corporation organized and existing under the laws of the State of New Jersey, to restrain the City of Helena, in the State of Montana, from erecting, constructing, purchasing, or otherwise acquiring, a water plant and system, and from acquiring a water supply, to be owned and controlled by said city for the purpose of furnishing said city and its inhabitants, or any thereof, with water, except the water plant, system, and supply of the complainant, and from engaging in the business of furnishing said city and its inhabitants, or any thereof, with water, except in the event it acquires the plant, system, and supply of the complainant, and from incurring any indebtedness or expending any money therefor.

It is alleged in the complaint that the city of Helena is a municipal corporation, organized and existing under and by virtue of the laws of the Territory and State of Montana; that the complainant is a tax-payer in said city; and that the matter in dispute
270 exceeds in value the sum of $2000, exclusive of interest and costs. It is alleged that in January, 1890, the city council of Helena passed, adopted, and published, as by law required, ordi-

nance No. 248; that this ordinance was approved by the mayor of said city on the 15th day of January, 1899. It is further alleged that within thirty days after the passage of said ordinance the Helena Consolidated Water Company complied with all and singular the provisions and requirements of said ordinance, and that in doing so it expended a large amount of money, aggregating several hundred thousand dollars, in acquiring a water supply and a system through and by which to furnish water to said city and its inhabitants, as by said ordinance required, and that said system and supply were accepted by the City of Helena as complying with the requirements of said ordinance. The complaint sets forth the proceedings, sale, and transfer of the property by which the complainant became the owner of the water supply, plant, system, and property of the Helena Consolidated Water Company, including all rights, franchises, and privileges, granted and conferred by ordinance No. 248.

The bill further alleges, in substance, that, in the years 1899, 1900, and 1901, the City of Helena adopted certain ordinances and took certain proceedings for the purpose of acquiring a water plant and system of its own, and it is charged that the said city will engage in the business of furnishing water to the city of Helena and its inhabitants unless restrained by the court; that said ordinances and proceedings impair the obligations of the contract between the complainant and said City of Helena, in violation of section 11 of article III. of the constitution of the State of Montana, and of section 10 of article I. of the Constitution of the United States; that the property of the complainant, consisting of said water plant and system, franchise, and contract, will be confiscated and taken without
271 just compensation being first paid therefor, in violation of section 14 of article III. of the constitution of the State of Montana, and that said property will be taken without due process of law, in violation of the fourteenth amendment to the Constitution of the United States.

Ordinance No. 248, so far as its provisions are material to this case, is as follows:

"SECTION 1. There is hereby granted to the Helena Consolidated Water Company, and its successors and assigns, for the full term of twenty years from the passage hereof, the license and franchise of laying and maintaining water mains and pipes in and through all of the streets, alleys, avenues and public grounds of the city of Helena for the purpose of conveying and distributing water throughout the said city, and for the purpose of selling the same to all persons, bodies, or corporations within the said city desiring to purchase the same, and to said city for fire, sewerage and other purposes, in case said city desires to purchase the same, subject, however, to the provisions of this ordinance hereinafter contained, establishing maximum rates, and generally to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water to the inhabitants of said city if required; provided, however, that nothing herein contained shall be

so construed as to give to the said Helena Consolidated Water Company, or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys and public grounds, of said city with water mains and pipes, or the exclusive right of conveying, distributing or selling the same throughout the said city, or of furnishing the same to said city, except as hereinafter set forth.

"SEC. 2. For the purpose of laying, repairing, keeping, and maintaining such water mains and pipes there is hereby granted to said Helena Consolidated Water Company, and to its successors and assigns, the right and privilege of digging ditches and making
272 excavations in and upon any and all streets, avenues, alleys, public grounds, and thoroughfares of the city; provided, that it or they shall, without unreasonable delay, restore the same to as good condition as they were before the said excavations were made, and remove all earth, sand, rubbish, and other material.

"SEC. 3. All pipes and mains, including service pipes connected therewith, shall be laid at the depth of five feet below the established grade, and shall be laid under the supervision of the street commissioner of said city as to grade and location in streets; and all repairs and extensions of such pipes and mains shall be done under the supervision of said street commissioner as to grade and location in streets. Nothing contained herein shall preclude said City of Helena from regarding or changing the grade of any street or streets within said city, or from the construction or maintenance of sewer work, or other works or plants of a public nature, or from letting, giving or granting any franchises, rights or easements to any person or persons, corporation or corporations, whomsoever, so long as such franchises, rights and easements do not interfere with the franchises, rights and easements hereby granted. And that said Helena Consolidated Water Company must and shall look solely and exclusively to the person or persons, corporation or corporations: to whom such franchises, rights, and easements have been given by said city for any and all damages the said Helena Consolidated Water Company may sustain by reason of any interference with any of its pipes, mains or hydrants, or any exposure of the same caused by such person or persons, corporation or corporations.

"SEC. 4. The works hereby contemplated shall be so constructed and maintained as to interfere as little as possible with the property of others; and any damage resulting from said erection, construction and operation thereof, shall be repaired and paid for by the said Helena Consolidated Water Company, or its successors
273 or assigns.

"SEC. 5. It is hereby provided that in no case shall the mains and pipes laid and maintained under the provisions of this ordinance in any manner interfere with any mains or pipes legally laid in said streets so as to injure or obstruct the use thereof; nor shall such pipes or mains interfere or obstruct any sewer now in said streets, nor shall there be any interference with mains, pipes or sewers which may be hereafter authorized to be laid or constructed by or under the authority of said city of Helena by mains hereafter

laid by the said Helena Consolidated Water Company or its successors or assigns, and at all places and points in the said city where said mains and pipes approach gas mains or pipes there shall be at least six inches of earth between the same.

"SEC. 6. The said Helena Consolidated Water Company shall furnish and provide a full, ample and sufficient supply of good, pure, wholesome and clear water for the use and wants of the inhabitants of said city, and to provide said city with water for fire, sewerage (maintenance and construction) and for other purposes; and such supply shall be full, ample and sufficient for the present population of said city, and for the future population of the said city as the same may be from time to time during the full term of five years; and said water shall be pure, wholesome and free from animal, vegetable or mineral substances, such as would render it unhealthy or unfit for domestic use.

"SEC. 7. The pressure in pipes and mains at the level of the first floor of the courthouse of Lewis and Clarke county, in said city, and at all other points of equal height, shall be maintained at not less than sixty pounds to the square inch if reservoir works shall be used; and if the direct pressure system shall be used, sixty pounds to the square inch fire pressure, and forty pounds to the
274 square inch ordinary pressure shall be maintained at said points and all other points of equal height."

Section 8 describes the streets on which the water company shall lay mains or provide for at its own cost.

"SEC. 9. The said Helena Consolidated Water Company shall place down and connect with the twenty miles of mains herein provided for, at points to be designated by the city council, or a committee thereof, two hundred hydrants, and shall maintain said hydrants during the continuance of this contract. Said hydrants shall have double nozzles and shall be non-freezing and of the latest and most improved pattern, and all connections of such hydrants with the mains shall be of not less than four inches in diameter. Provided, that if the contractor use any system of pipes and hydrants now in said city and formerly belonging to the Helena Water Company, such hydrants need not be changed or renewed, and said council shall not change or relocate the same, but said hydrants shall be considered as having been located by the said city council or committee thereof under the provisions of this ordinance. The location of mains and hydrants to complete the twenty miles of mains, and the two hundred hydrants provided for in this ordinance, shall be made by the city council when the said water company is ready to erect the same without delay or loss to the said water company.

"SEC. 10. The said Helena Consolidated Water Company shall lay and maintain, in addition to the twenty miles of mains hereinbefore specified, such mains, of such sizes, at such times, and upon such streets as the city council shall from time to time direct, which said work shall be commenced and prosecuted to completion with diligence and without unreasonable delay, and shall place and

maintain one hydrant for each one-tenth of a mile on such additional mains, if the same shall be of the diameter of six inches or more, or if the same shall be of the diameter of less than six
275 inches, then one hydrant for each one-seventh of a mile, said hydrants to be of the pattern above specified; no hydrant to be placed on any pipe of less than four inches in diameter.

"SEC. 11. All water which may be required by said city of Helena for the use of any and all buildings owned and occupied by said city for municipal purposes, and also all water necessary for street sprinkling purposes, in said city, shall be furnished by the said Helena Consolidated Water Company without cost or charge to said city; provided, however, that in case the said city shall hereafter desire to use any water for street sprinkling purposes, the same must be taken from the mains of the said Helena Consolidated Water Company by means of stand-pipes erected at the cost and expense of said city, at such point or points as may be necessary upon the lines and mains of said company, and that said city shall not have the right to use any of the hydrants of the said company for the purpose of obtaining water for street sprinkling purposes.

"SEC. 12. In case of unavoidable accident or breakage of machinery, due time shall be given to the said Helena Consolidated Water Company to repair the damages, but it shall receive no pay from any person or corporation for any time during which it fails to furnish water for the causes in this section stated.

"SEC. 13. The works hereinbefore provided for, and the water system connected therewith, shall be completed and in readiness for the conveyance and distribution of water throughout the twenty miles of mains hereinbefore provided for, on or before the 1st day of July, 1890.

"SEC. 14. The mayor and any committee of said council of said city, or any officer or person authorized by said council, shall at all times have free access to the entire works and system of the said Helena Consolidated Water Company, for the purpose of inspecting and examining, or testing the same, or any part or portion thereof.

276 "SEC. 15. Said Helena Consolidated Water Company shall, from and after the 20th day of January, 1890, until said system is completed in accordance with the terms of this contract, furnish the said city of Helena with water for fire, sewerage and other purposes, through the hydrants included in the contract between the said City of Helena and the Helena Water Company, and the hydrants on such extensions as have been or may be ordered by the city council of said city, at the price herein provided for; but it shall not be required to complete its system for the conveyance and distribution of water through the twenty miles of mains herein provided for, before the first day of July, 1890."

Section 16 states the charges to be made for water furnished by the said water company to any persons.

"SEC. 17. The said Helena Consolidated Water Company shall make no charge for tapping mains for the connection of service pipes

therewith, except the actual cost of labor and materials required, and in no case to exceed two dollars and fifty cents for four inch mains, three dollars for six inch mains, three dollars and fifty cents for eight inch mains, four dollars for ten inch mains, and four dollars and fifty cents for twelve inch mains. Such connection shall be made at the cost of the applicant by any plumber whom he may employ, but not, however, until such applicant shall have procured a permit for such connection from the said Helena Consolidated Water Company. Provided always, that said company shall not refuse to permit connections to be made by or to sell or deliver water to any persons who shall offer to pay for the same and shall comply with the provisions of this ordinance, and with such regulations as may be from time to time prescribed by the city council of said city, and the reasonable rules and regulations of said company.

"SEC. 18. The said Helena Consolidated Water Company shall have the right to put in a stopcock on each service pipe below the
277 sidewalk near the curb, at its own proper cost and expense, and shall box the same securely and place the cover flush with the sidewalk, and may turn off the water from any premises when the water rates are not paid within fifteen days after the same shall have become due, and when said consumer has failed to comply with any reasonable rule or regulation of said company, but the said company shall not place any self-closing faucet or water bib upon any service pipe without the consent of the owner thereof.

"SEC. 19. No person or persons, excepting the mayor and fire marshal, or those acting under their authority, or the authority of the said city council, and the agents and employees of the said water company, shall meddle with or use any of the hydrants provided for in this ordinance, and any person violating this provision shall be deemed guilty of a misdemeanor, and, upon conviction thereof, be fined not less than five dollars nor more than fifty dollars. Said hydrants shall only be used for fire and sewerage purposes.

"SEC. 20. From and after the 20th day of January, 1890, the said Helena Consolidated Water Company shall keep and maintain in the storage reservoir formerly belonging to the Helena Water Company and commonly known as the Woolston reservoir, or in the reservoir formerly belonging to Helena Water Company and commonly known as the Hale reservoir, a depth of not less than six feet of water, and after the first day of July, 1890, shall keep and maintain in both of said reservoirs a depth of not less than six feet of water.

"SEC. 21. There is hereby appropriated out of the yearly revenues of the said city of Helena, for the use and benefit of the said Helena Consolidated Water Company, its successors and assigns, during the full term of five years from and after the 20th day of January, 1890, the following sums of money, to wit: Out of the general
278 fund of said city the sum of twenty dollars per year for each hydrant required by this ordinance to be kept and main-

tained by the said Helena Consolidated Water Company, on the twenty miles of mains provided for in this ordinance; and for the use of the water through said hydrants by said city for the purpose of sewerage, and the sum of sixteen dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purposes. Out of the fire department fund of said city the sum of eighty dollars per year for each hydrant required by this ordinance to be kept and maintained by said Helena Consolidated Water Company on the said twenty miles of mains provided for in this ordinance, and for the use of the water through said hydrants by said city for the purpose of extinguishing fires and for the fire department; and the sum of fifty-eight dollars and seventy-five cents per year for each additional hydrant and water as herein provided for, for the same purpose. And it is hereby made the duty of said city council, during the said term of five years, to levy annual taxes under the provisions of the charter of said city authorizing the levy of taxes for general purposes and for fire department purposes sufficient in amount to provide funds to meet the appropriations hereby made. For the purpose of carrying out the provisions of this section, the mayor and city clerk are hereby authorized, upon allowance by the city council to draw warrants on the above funds for the above amounts and to pay the same unto the said Helena Consolidated Water Company, its successors or assigns, at the end of each month; provided, however, that if the said company shall fail to comply with the requirements herein contained concerning the pressure and depth of water in the reservoirs to be maintained, it shall forfeit all claims for payment for the month during which such failure occurs; and if such failure shall continue for more than three days after written notice by the city, then the said company shall pay a further forfeit of five hundred dollars per day, which said forfeit shall be paid before said com-
279 pany shall receive any further payment from said city in pursuance of the provisions of this ordinance. This provision, however, shall not apply to cases where the failure occurs through accidents, as provided in this ordinance.

"SEC. 22. In the use of water under this ordinance for the purpose of flushing sewers, said Helena Consolidated Water Company shall furnish water for such number of flushing tanks as said city council may from time to time require, but said flushing tanks shall be so set and regulated that the same will dump or discharge themselves but twice in every twenty-four hours.

"SEC. 23. Nothing contained in this ordinance shall in any manner interfere with or curtail the rights of the said Helena Consolidated Water Company to prosecute any action or maintain any claim it may have against any person or persons, corporation or corporations, which shall break, injure or destroy any hydrants or other property belonging to said company, including such damage or compensation as said company may be entitled to by reason of the loss or want of water occasioned by such break, injury or destruction of the said hydrants.

"SEC. 24. Said Helena Consolidated Water Company, or its successors or assigns, may have the right, and they are hereby given the privilege of making such reasonable rules and regulations as may be necessary for the purpose of carrying on the business of furnishing water, under the provisions of this ordinance, and for the purpose of making personal examination of the premises of an applicant for water, and of designating rates as herein established, and for the purpose of acquiring the right of access at all reasonable hours to all premises supplied with water for the purpose of designating the rates, and ascertaining whether or not such customer is wasting the water within the meaning of this ordinance; all of which rules and regulations shall be such as are authorized by law, and shall be binding upon the persons or corporations connecting with the works of said company, or taking water from the
280 mains of said company.

"SEC. 25. Within thirty days after the passage of this ordinance the said Helena Consolidated Water Company shall file with the clerk of said city an acceptance in writing for itself and for its successors and assigns, of all the terms, conditions and provisions of this ordinance, and a bond in the penal sum of $50,000, with two or more sufficient sureties to be approved by the mayor, conditioned that if the said company shall receive the sums of money herein agreed to be paid to it for the term of two years, upon its compliance with the conditions herein set forth, it will indemnify and save harmless the said city from any and all damages, costs, expenses, or liability therefor of whatsoever character, and to whomsoever the same may be due, or become created by, or in any manner arising from ordinances No. 93, approved November 22, 1886, or ordinance No. 95, approved February 13th, 1887. And this ordinance shall have no force or effect whatever except upon the filing of said acceptance and bond as herein provided; and also a relinquishment by George F. Woolston and the Helena Water Company of Salem, Ohio, from all claims against said city to the date of this contract arising from the ordinance in the section mentioned.

SEC. 26. It is hereby declared and understood to be of the essence of the agreement and the acceptance hereof that the said Helena Consolidated Water Company shall, at all times during the term of such agreement, provide all the inhabitants of the city, whatever their number may be, with a full, ample, and sufficient supply of good, pure, and wholesome and clear water, and shall convey, distribute and sell the same to them upon the terms and conditions herein provided and expressed."

To this bill of complaint the City of Helena interposed a demurrer, upon the grounds that the bill of complaint did not state facts sufficient to entitle the complainant to the relief demanded, or any relief, and that the bill was multifarious in the
281 joinder of an alleged cause of action upon a contract with an alleged cause of action as a taxpayer. The city also filed a plea to the bill, alleging the commencement and pendency of actions in the State court brought by the city prior to the filing of the bill

of complaint for the purpose of exercising, on the part of the city, the right of eminent domain in condemning certain water rights to supply the city of Helena and its inhabitants with water. The plea also alleged that prior to the filing of the bill of complaint the complainant and one Harry B. Palmer had commenced separate actions in the State court to restrain the City of Helena from auditing, allowing, or ordering paid any claim or demand against said city on account of any indebtedness incurred at any time when the indebtedness of the said city exceeded three per centum of the assessed value of the taxable property of said city, as ascertained by the last assessment for State and county taxes. Upon a hearing by the court, the demurrer and plea was overruled, and a temporary injunction issued as prayed for in the bill of complaint.

The defendant in its answer admits the material allegations of the complaint, and among others, the proceedings taken to procure a water system and supply of its own. To this answer a replication was filed, and thereupon the case was submitted to the court upon an agreed statement of facts. From this statement it appears that "the indebtedness of the defendant is now and has been for several years last past in excess of three per cent. (3 %) of the assessed value of all the taxable property in said city, as determined by the assessment for the State and county taxes during each and all of said years. That said indebtedness is now, and has been for several years last past, in excess of the sum of four hundred and eighty-six thousand dollars, and that the value of the taxable property during all of said times in said city, as determined by the assessment
282 for the State and county taxes for each of said years, does not and has not exceeded the sum of thirteen million dollars, and that no election has ever been held by the said defendant, The City of Helena, at which either the question of issuing bonds or contracting an indebtedness for a water plant, water system and water supply to be owned and controlled by said city, has been submitted to the qualified electors thereof; and that no other election upon which proceedings to allow a water plant and supply are based, has been had, except as hereinafter stated.

"That said defendant, The City of Helena, has never given the complainant notice that it desired to purchase its plant, franchise or water supply, and that no effort has ever been made by the said defendant to agree with complainant upon the terms of such a purchase to acquire the plant and water supply of complainant except as hereinafter stated in paragraphs VIII., and as follows: That during the months of September and October, 1899, pursuant to an order of the city council of said defendant city, defendant advertised for sealed proposals in the 'Helena Daily Independent,' a daily newspaper of general circulation in said city and State; and in the 'American Contractor,' a weekly publication of general circulation in the city of Chicago, State of Illinois, and throughout the United States, for sealed proposals for the 'construction and purchase of a water plant and supply,' in accordance with certain plans and specifications theretofore adopted by said city

council, said proposals to be opened on November 6th, 1899. That said plans and specifications expressly stated therein and contained the following: 'It is expressly understood that nothing herein contained shall prevent any company now operating a water plant in the city, or any other company or individual from submitting a bid for the sale of any plant now constructed, or one proposed to be constructed; upon a place different from
that herein specified; but any such company or indi-
283 vidual may submit any bid that it or he may desire, upon
any other basis, and any and all such bids will be considered by the council in connection with any and all other bids received.' And that in response to said advertisement, a proposition was received from complainant herein, through Edgerly & Crocker, by Francis M. Edwards, their agent, offering to sell to defendant the water plant and system of complainant herein for the sum of nine hundred and ninety thousand dollars. That at the time of receipt of said proposition by complainant, and the opening of bids by said city, to wit, November 6, 1899, the limit of indebtedness over and above the three per cent. limit fixed by the constitution had not yet been extended, and that thereafter, to wit, at an election of the taxpayers affected thereby, or said city of Helena, held on the 4th day of December, 1899, pursuant to an ordinance in that behalf duly passed and approved, the question was submitted to said taxpayers affected thereby, whether the limit of indebtedness should be extended ten per cent. over and above said three per cent. limit, for the purpose of procuring a water supply and system to be owned and controlled by said defendant, and which should devote the revenues derived therefrom to the payment of the debt incurred therefor; the last assessed valuation of said city theretofore for State and county taxes being the sum of ten million, seven hundred and forty thousand dollars; but that the majority of the taxpayers affected thereby, voting at said election voted 'No,' and against said proposed extension of ten per cent., and that as a result thereof, the city council of said defendant was obliged to and did reject said bid and all others received.

"That thereafter an election was held on the 18th day of January, 1900, as alleged in the complaint, at which the majority of the taxpayers affected thereby of said city voted 'Yes,' and in favor of extending the limit of indebtedness of said city five per centum, or in
amount six hundred fourteen thousand, four hundred and
284 seventy-five dollars and fifty cents over and above the three
per cent. limit, for the purpose of procuring a water supply and system to be owned and controlled by said city, and which should devote the revenue derived therefrom to the payment of the debt incurred therefor; and thereafter on the 4th day of June, 1900, by ordinance No. 477, duly passed by the city council of said defendant, and approved by the mayor on said date, said limit of indebtedness was, in accordance with said vote at said election, duly extended five per centum over and above the three per cent. limit, provided by section 6 of article XIII. of the constitution of the State

of Montana, of the total assessed valuation of the taxable property of said city as ascertained by the last assessment theretofore for the State and county taxes, to wit, five per cent. of $12,287,510; namely, $614,475.50 over and above said limit of three per cent. for the purpose of procuring a water system and supply for said city, which shall own and control the same and devote the revenues derived therefrom to the payment of the debt incurred therefor; and that thereafter, said defendant in that behalf by the city council of said city duly authorized, commencing on the 7th day of June, 1900, and ending on the 20th day of June, 1900, advertised daily for sealed proposals in the said 'Helena Daily Independent,' for a 'water supply' and also for a 'water supply and system' to be owned and controlled by said city, in accordance with certain plans and specifications therein referred to and theretofore adopted by the city council of said city; said proposals to be opened on June 25, 1900, at the regular meeting of the city council on said date. That said plans and specifications in said advertisement referred to were as hereinbefore stated. But that no bid or proposal or response of any kind whatsoever to said advertisement was made by complainant herein, or by said defendant received from complainant in response thereto.

"That the City of Helena contemplates and intends to do
285 all acts and things necessary to secure a water supply and system to be owned and controlled by the said city of Helena, and that it contemplates and intends to raise funds and revenue therefor in the manner provided by law, and to use the same for said purpose, and to furnish and supply the city of Helena and the inhabitants thereof with water from its said plant, and that it contemplates and intends to purchase and secure a sufficient quantity of water for said purpose, and that complainant does not obtain any of its water supply from either Beaver, McClellan or Prickly Pear creeks.

"That the ordinances Nos. 467 and 483 mentioned in paragraph XXVII. of the complainant's bill of complaint, were duly passed and adopted and approved, and that unless said defendant, The City of Helena, is enjoined and restrained from acquiring a water supply, plant and system, it will proceed to acquire the same under said ordinances or such others as are necessary for said purpose as hereinbefore stated, and will engage in furnishing the said defendant, The City of Helena and inhabitants with water suitable and proper for its use, and that to do so will depreciate the value of complainant's franchise and property as stated in paragraph XXVIII. of the complaint; but that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it.

"That the facts stated in paragraphs XXIX., XXX., and XXXI. of the complainant's bill of complaint are true, except as to the legal inferences and deductions made therefrom, and the further fact that the acts complained of will not result in great and irreparable injury and damage or any damage or injury to said complain-

ant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena.

"It is also agreed that — an election held at said city on the
286 29th day of July, 1895, it was decided that the limit of the city's indebtedness might be extended under the constitution and laws passed in pursuance thereof by the legal voters of said city. That thereafter the city council of said city by resolution duly passed, directed the city clerk to advertise for bids for a snpply of water to be furnished, owned and controlled by said city in accordance with plans and specifications theretofore adopted, and complied with the requirements of the law in such matters as hereinabove in paragraph IV. stated. That on the 14th day of December, A. D. 1895, said The Helena Consolidated Water Company, predecessor in interest of complainant, commenced its action in the district court of the first judicial district of the State of Montana, in and for the county of Lewis and Clarke, by which it sought to enjoin the defendant from advertising and receiving bids for said purpose, and to which complaint defendant, The City of Helena, duly filed its answer; that a restraining order was duly issued and an appeal therefrom duly taken to the supreme court of the State, and by that court the said judgment so appealed from was reversed and said cause remanded with directions to said trial court to dissolve said injunction and dismiss said complaint; that thereupon a mandate duly issued and said injunction was dissolved and said complaint dismissed and judgment entered accordingly, all of which said proceedings are still in full force and effect and unreserved, and a copy of the pleadings, order for injunction, appeal, judgment and opinion of the supreme court *are* hereto attached and admitted with all the force and effect to which the same may be and are entitled.

"That said defendant, City of Helena, has made no other efforts under the allegations of paragraph XXIV. of said complaint than as herein set forth, and that it proposes and intends to construct and establish a water plant and system to be owned and possessed by
it prior to the expiration of the alleged contract and franchise
287 of complainant, at such time as in its judgment and discretion it is feasible and proper so to do; and all actions and proceedings necessary therefor instituted and maintained; and that unless enjoined and restrained from so doing it will, both before and after the expiration of said alleged contract and franchise, furnish and supply the said city and the inhabitants thereof with water. That the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf, unless it shall be adjudged that it has no legal or equitable right to do so on account of the facts and admissions hereinbefore stated and made.

"And it is further agreed that said ordinance No. 248 is in full

force and effect except in so far as it is or may be affected or modified by the ordinances or resolutions aforesaid."

Upon the pleadings and the agreed statement of the facts, the circuit court entered a decree, adjudging and decreeing that the City of Helena, its officers and agents, be enjoined and restrained from acquiring a water plant, system, or supply, other than the plant, system, and supply of complainant, to be owned or controlled by it, for the purpose of supplying its inhabitants, or any thereof, with water, and from furnishing or supplying said inhabitants, or any thereof, with water until after the expiration of the franchise granted to the Helena Consolidated Water Company, its successors and assigns, by ordinance No. 248 of the ordinances of said city, to wit, January 15, 1910.

From the decree of the circuit court awarding an injunction, the City of Helena appeals to this court.

288 Edward Horsky, city attorney, and R. Lee Word, and Toole & Bach, attorneys for appellant.

Carpenter & Carpenter, and Clayberg & Gunn, attorneys for appellee.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, after the foregoing statement of facts, delivered the opinion of the court.

It is clear that ordinance No. 248 does not grant an exclusive franchise to the water company to supply the inhabitants of the city of Helena with water during the term of the franchise, since the contrary is expressly provided in the first section of the ordinance granting the franchise and prescribing its terms. It is there provided that "nothing herein contained shall be so construed as to give to the said Helena Consolidated Water Company or its successors or assigns, the exclusive right of occupying the streets, avenues, alleys, and public grounds of said city with water mains and pipes, or the exclusive right of conveying, distributing and selling the same throughout the city, or of furnishing the same to said city, except as hereinafter set forth." The meaning of this proviso is made still more definite and certain by reference to the previous language of the section making the grant of the franchise for laying and maintaining water mains and pipes for the purpose of distributing water throughout the city subject to the qualification that the water is to be sold to "all persons, bodies, or corporations within the city desiring to purchase the same," and making the general grant to have and exercise all the rights, privileges, and franchises necessary to the proper and successful furnishing of water subject to the further qual-

289 fication that the water is to be furnished "to the inhabitants of said city, if required." In other words, the ordinance grants to the water company for the term of twenty years the license and franchise for laying and maintaining water mains and pipes for the purpose of distributing water throughout the city for sale to

such purchasers as desire to obtain water from that company. But the franchise is not exclusive. The city may grant another franchise to another company to occupy the streets of the city with water mains and pipes for the purpose of conveying, distributing, and selling water to the inhabitants of the city in competition with the grantee of the franchise. This much is conceded by the appellee. But the controversy turns upon the right of the city to engage in the business of supplying the inhabitants with water in competition with the appellee during the term of the franchise. It would seem that if the city has the authority to grant a franchise to another corporation to construct and maintain a plant and system for supplying and selling water to its inhabitants, it would have the authority to construct and maintain a system for that purpose itself. The appellee contends, however, that the city has by the terms of ordinance No. 248 parted with that right during the continuance of the franchise and further, that the city is now proceeding without authority of law to procure a water plant and system of its own. These two questions appear to be the controlling questions in the case.

Whether the City of Helena is proceeding under authority of law to acquire a water plant and system to be owned and controlled by the city, involves the consideration of a provision of the constitution of the State and statutes of the State passed to carry the provision of the constitution into effect. The section of the constitution referred to is section 6 of article XIII., which provides as follows:

"No city, town, township or school district shall be allowed
290 to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the State and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township, or school district shall be void; provided, however, that the Legislative Assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the tax-payers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

It is stipulated in the agreed statement of facts that the indebtedness of the city of Helena is now and has been for several years last past in excess of three per cent. of the assessed value of all the taxable property in said city as determined by the assessment for the State and county taxes during each and all of said years. Subdivision 64 of paragraph 4800 of the Political Code of the State, relating to the legislative powers of cities and towns, as amended by the act approved March 6, 1895, extends the limit of indebtedness mentioned in the constitution, and provides that an additional indebtedness may be incurred by cities and towns incorporated under

the laws of the State, "when necessary to construct a sewerage system or procure a water supply for the said city or town, which shall own and control said water supply, and devote the revenues derived therefrom to the payment of the debt." The statute then proceeds to place a limit upon such additional indebtedness, providing that the limit of the indebtedness shall be submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of the
291 taxpayers who vote at such election. The statute further provides for the issue of bonds for such indebtedness, and where a water supply is being furnished by private parties, the acquisition of the plant of such parties instead of the erection or construction of a new plant. The last provision of the statute was declared unconstitutional by the supreme court of the State in Helena Consolidated Water Company v. William L. Steele, etc. 20 Montana, 1, thus disposing of that question, but the appellee objects to the remainder of the statute, on the grounds that it is a general law, whereas the constitution, it is contended, contemplated a special act adapted to the circumstances of each case. We do not think this objection can be sustained. The tendency of constitutional limitations upon legislative action is to require that no special law shall be enacted where a general law can be made applicable; and this provision we find in express terms in the constitution of Montana after an enumeration of cases where special laws are prohibited (section 26 of article V.). But it is not necessary to pursue this question further. We think the whole question whether the city is proceeding under the authority of law is covered by the agreed statement of facts. It is there stipulated "that the City of Helena contemplates and intends to do all acts and things necessary to secure a water supply and system to be owned and controlled by the said City of Helena, and that it contemplates and intends to raise funds and revenue therefor *in the manner provided by law.*" It is also stipulated "that no injury of which complainant can complain will result therefrom if defendant city has the rights claimed by it;" that the facts complained of "will not result in great and irreparable injury and damage, or any damage or injury to said complainant as a taxpayer or otherwise, unless it be found that the said acts are in violation of the rights of said complainant, and an unwarranted attempt to exercise powers and rights in behalf of said defendant, The City of Helena; that unless
292 enjoined and restrained from so doing, it (the City of Helena) will, both before and after the expiration of said alleged contract and franchise (ordinance No. 248), furnish and supply the said city and the inhabitants thereof with water; * * * that the revenue for said purpose will be created and raised by borrowing money or raising funds within the limit of indebtedness, as heretofore or hereafter to be extended *in accordance with the requirements of the constitution and provisions of the statutes of the State of Montana in that behalf*, unless it shall be adjudged that it has no legal or

equitable right to do so on account of the facts and circumstances hereinbefore stated and made."

If these stipulations mean anything, they mean that the city is proceeding regularly under the constitution and laws of the State for the purpose of securing a water supply and system to be owned and controlled by the city, and as the stipulations appear to be in accordance with the law and the facts, they will be so construed, without further discussion.

The only remaining question necessary to be considered is, whether under ordinance No. 240 the city has entered into an implied agreement or contract with the water company that it will not engage in the business of supplying water to the inhabitants of the city in competition with the water company during the term of the franchise. Referring again to the ordinance, we find in section 3 that the city made an express reservation that nothing contained in the ordinance should constrain the city "from the construction or maintenance of sewer works or other works or plants of a public nature." What are works or plants of a public nature? Section 6 of article XIII. of the constitution of the State, relating to public indebtedness, has authorized municipal corporations, as we have seen, "to promote a supply of water for such municipality, which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

This authority clearly contemplates works or plants of a public nature to carry out the constitutional power conferred upon the municipality, and the legislative assembly, in accordance with the authority of the constitution, has not only provided, in subdivision 64 of section 4209 of the Political Code for the creation of the indebtedness for the purpose of procuring a supply of water, but has also provided in subdivision 29 of the same section that the city or town council shall have power "to adopt, enter into, and carry out means for securing the supply of water for the use of the city or town or its inhabitants." This last provision is broad enough to authorize a municipal contract with a corporation or individual to supply the water required for the municipality; but it is also broad enough to authorize the city or town council to construct and maintain a plant of its own for that purpose, and, in our opinion, it was this power and authority that was reserved in section 3 of the ordinance. We are further supported in this view of the ordinance by an examination of section 6, where it is provided that the water company shall furnish and provide a full, ample, and sufficient supply of good, pure, wholesome and clear water for the use and waste of the inhabitants of the city, and to provide the city with water for fire, sewerage (maintenance and construction), and for other purposes, and that such supply shall be full, ample, and sufficient for the present population of the city and for the future population of the city, as the same may be from time to time, "during the full term of five years." This section might properly be construed as a contract with the water company that the water company should have the exclusive right of supplying the city and its inhabitants

with water during the first five years of the franchise. It might also be construed as an implied agreement that the city would
294 not establish a plant of its own for the purpose of supplying water to its inhabitants or for its own purposes during that period. But this period of five years has long since expired, and the section now only serves to indicate that for the remaining fifteen years of the franchise there was no exclusive franchise granted to the water company, and no implied agreement that during this last period it would not engage in the business of supplying water to the inhabitants of the city or for its own municipal purposes.

It appears that the court below followed the decision of the circuit court for the western district of Missouri, in the case of Southwest Missouri Light Co. *v.* City of Joplin, 101 Fed. 33; 113 Fed. 817. It will be found, upon examination of that case, that the statute under which the municipal authorities acted was in the alternative; that is to say, the city council might, under the authority of the statute, establish gas or electric works, or light works of any kind, for the purpose of supplying the inhabitants of the city with light, or they might in their discretion grant the right to any person or corporation upon such terms as might be prescribed by ordinance, providing that such right should not extend for a longer period than twenty years. The city council, in the exercise of its discretion, adopted the latter alternative, and granted to certain persons the right to establish a light plant for the generation of electricity, for the purpose of furnishing light, heat, motor power, and other purposes, for the period of twenty years. The circuit court very properly held that the city council having adopted the alternative method of procuring light for the city and its inhabitants contemplated by the statute, it was an implied term of the contract, made by the acceptance of the ordinance, that the city could not itself enter into competition with the grantee in supplying light to consumers during the term of the grant by means of a light plant erected under the powers conferred by the statute.

295 The law under which the City of Helena acted in this case prescribed no such alternative conditions, and we certainly ought not to assume that they are to be implied; unless the implication is so plain as to be beyond all doubt; and this is not the case with respect to either the law of the State or the ordinance of the city.

Public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no farther than is expressly declared by the language employed for the purpose of their creation. The grantee takes nothing in that respect by inference. Such is deemed the legal intent of the State in imparting to its citizens or corporations powers and privileges of public character. Syracuse Water Co. *v.* City of Syracuse, 116 N. Y. 167, 178; the general doctrine is that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and

explicit terms. Charles River Bridge *v.* Warren Bridge, 11 Pet. 420; Rice *v.* Railroad Company, 1 Black. 358, 380.

In Bienville Water Supply Co. *v.* Mobile, 95 Fed. 539, 175 U. S. 109, the city of Mobile was authorized and empowered by its charter and an act of the legislature to build or otherwise acquire water works of its own to supply water to itself and its inhabitants for the extinguishment of fires and for sanitary and domestic purposes. The city, instead of building or acquiring water works of its own, entered into a contract with the Bienville Water Supply Co., by which it was agreed that the water company would furnish for the use of the city 260 fire hydrants and water for fire service of a certain number of streams and pressure; and it was further agreed that the city would have the unrestricted use of such hydrants for such fire purposes and the free use of
296 water for all municipal buildings. The water company agreed not to charge during the continuance of the contract for domestic use a greater or higher rate for water than that named and specified in the contract. The city, in consideration of the stipulations contained in the agreement on the part of the water company agreed to pay the water company for the use of the hydrants at the rate of $50 per annum for each hydrant during the continuance of the contract. It was agreed that the contract should be for six years. It was afterwards extended for a period of twelve years. Before the expiration of this contract, the city proceeded to erect water works of its own for the purpose of supplying water to its inhabitants and for its own use. The water company filed a bill in equity in the United States circuit court against the city to enjoin it from making or carrying out any other contract for supplying water to its inhabitants, or from the construction of a system of water works for that purpose during the continuance of the contract with the water company, and from building or acquiring a system of water works to bring water into the city during such contract. To this bill the city demurred. In support of the bill the water company contended that the city had no legal right to impair the value of its plant or to destroy or diminish its income therefrom, which would be the effect of the city's action in building water works and furnishing water to its inhabitants, and it was averred that the city was insolvent and that the only way complainant could protect itself was through the interposition of a court of equity. It was not asserted by the water company that it had been granted an exclusive franchise to furnish water to the city and its inhabitants, but it was contended that under the contract the city had no right to furnish water to other persons or to build or acquire a system of water works to supply water to itself and its inhabitants, and that to do this was a violation of the contract. The bill was dismissed by the
297 circuit court. In the supreme court the decree of the circuit court was affirmed, the supreme court holding that no acts were averred showing that the city was violating or intended to violate its contract with the water company.

In the case of Skaneateles Water Co. *v.* Skaneateles, 184 U. S. 354,

the franchise granted to the water company was very much of the same character as the franchise involved in this case. It was there said that "there is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in the future be reduced. Such a contract would be altogether too far reaching and important in its possible consequences in the way of limitation of the powers of a municipality, even in matters not immediately connected with water, to be left to implication. We think none such arises from the facts detailed."

The principle of these last cases we think disposes of the question whether the City of Helena, has, under ordinance No. 248, parted with the right to construct and maintain a plant and system for supplying and selling water to its inhabitants, and disposes of the question in favor of the city.

The decree of the circuit court is therefore reversed, with instructions to dismiss the bill of complaint.

(Endorsed:) Opinion. Filed March 9th, 1903, F. D. Monckton, clerk.

298 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
v.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Appeal from the circuit court of the United States for the district of Montana.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Montana and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby, reversed, with costs, and the cause remanded to said circuit court with instructions to dismiss the bill of complaint.

(Endorsed:) Decree. Filed and entered Mar. 9, 1903, F. D. Monckton, clerk.

299 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
versus
THE HELENA WATER WORKS COMPANY, Appellee.

Petition for Appeal.

The above named complainant and appellee, The Helena Water Works Company, conceiving itself aggrieved by the decision and decree of the above entitled court made and entered on the 9th day of March, A. D. 1903, reversing the decree of the United States circuit court, ninth circuit, in and for the district of Montana, in said cause, and ordering and directing a dismissal of the bill of complaint therein, does hereby petition for an appeal from said decree of this court to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herewith; and your petitioner shows that the jurisdiction of the circuit court of the United States, ninth circuit, in and for the district of Montana, was not dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States, but that in and by the bill of complaint it is alleged and claimed that a contract exists between your petitioner and The City of Helena, appellant in this court and defendant in the court below, wherein and whereby the said City of Helena agreed and contracted that it would not engage in the business of supplying the city of Helena and its inhabitants with water during the
300 term of the franchise granted to the Helena Consolidated Water Company, the predecessor in interest of your petitioner, by ordinance No. 248 of the ordinances of said city made a part of the bill of complaint as Exhibit "A," and that ordinances numbered respectively 467 and 483 and the preamble and resolution referred to in paragraph 27 of said bill of complaint as Exhibits "B," "C," and "D," respectively, impair the obligation of said concract, in violation of section 10, article I of the Constitution of the United States, all of which will more fully and at large appear by reference to a copy of said bill of complaint contained in the transcript of record on file in this court.

Wherefore, your petitioner prays that said appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decision was made and decree rendered by the above entitled court, duly authenticated, may be sent to the Supreme Court of the United States.

B. PLATT CARPENTER,
STEPHEN CARPENTER, AND
M. S. GUNN,
Solicitors for Complainant and Appellee,
The Helena Water Works Company.

It is ordered that the appeal prayed for be and the same is hereby allowed.

Dated at San Francisco, California, this 3rd day of April, A. D. 1903.

WM. B. GILBERT,
Circuit Judge.

(Endorsed:) Petition of appellee for order allowing appeal and order allowing same. Filed Apr. 6, 1903, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

301 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
versus
THE HELENA WATER WORKS COMPANY, Appellee.

Assignment of Errors.

Comes now the above named appellee in this court, and complainant in the court below, and assigns the following errors upon which it will rely for a reversal of the decree rendered by this court in this cause on the 9th day of March, A. D. 1903, on the appeal therefrom to the Supreme Court of the United States:

1. The court erred in holding and deciding that the appellant, The City of Helena, did not, by virtue of the passage, approval and acceptance of ordinance No. 248 made a part of the bill of complaint as Exhibit "A," enter into an agreement or contract with the Helena Consolidated Water Company, its successors and assigns, that it would not engage in the business of supplying water to the inhabitants of said city in competition with the said Helena Consolidated Water Company, its successors and assigns, during the term of the franchise granted by said ordinance, to-wit, twenty years.

2. The court erred in holding and deciding that in and by section 3 of said ordinance No. 248, the right of the City of Helena to acquire a water plant, system and supply, and engage in the business of supplying water to said city and its inhabitants, is reserved.

302 3. The court erred in holding and deciding that by virtue of section 6 of said ordinance No. 248, the agreement that the city would not engage in furnishing water to its inhabitants in competition with the grantee of said franchise, its successors and assigns, was limited to the period of five years.

4. The court erred in holding and deciding that the grant to the Helena Consolidated Water Company, its successors and assigns, of the right to supply water to the city of Helena and its inhabitants, is one which should be construed strictly, for the reason and because the question of whether or not the said City of Helena has the right to acquire a water plant, system and supply, and engage in business in competition with appellee, depends upon the construc-

tion of the contract resulting from the passage, approval and acceptance of ordinance No. 248 which contract was made by the said city in the exercise of its business or proprietary powers as distinguished from its legislative or governmental powers.

5. The court erred in holding and deciding that ordinances numbered respectively 467 and 483 and the preamble and resolution attached to and made a part of the bill of complaint, as Exhibits "B," "C," and "D," respectively, do not impair the obligation of the contract resulting from the passage, approval and acceptance of said ordinance No. 248, for the reason and because by virtue of said contract the said City of Helena contracted and agreed that it would not, during the term of the franchise granted by said ordinance, acquire a water plant and supply for and engage in the business of supplying water to the inhabitants of said city, and by the passage and approval of said ordinances Nos. 467 and 483 respectively and said preamble and resolution, the contractual obligation on
303 the part of said city to desist and refrain from becoming a competitor of appellee in the business of furnishing water to the inhabitants of said city is violated.

6. The court erred in holding and deciding that because the said City of Helena has authority to grant a franchise to another corporation to construct and maintain a plant and system and supply and sell water to the inhabitants of said city in competition with appellee, the city itself can acquire a supply and plant and engage in the business of furnishing water to said inhabitants, for the reason and because said city may have a right to grant such a franchise without having the right to acquire a supply and system and engage in such business itself.

7. The court erred in holding and deciding that section 6 of article XIII of the constitution of the State of Montana does not require a special statute authorizing the City of Helena to extend the limit of its indebtedness as provided therein, but that the general law in force is sufficient for such purpose, for the reason and because said section clearly contemplates the enactment of a special law applicable to a particular city.

8. The court erred in holding and deciding that the question of the proper construction of section 6 of article XIII of the constitution of Montana is foreclosed and waived by the agreed statement of facts in said case.

9. The court erred in holding and deciding that the last provision of subdivision 64 of section 4800 of the Political Code of Montana, as amended, is in violation of the constitution of Montana, and that the question of the constitutionality thereof is disposed of by the case of Helena Consolidated Water Company *v.* Steele, 20
304 Montana page 1, for the reason and because said statute now in force was not considered in said case, and is materially different from the statute considered and held unconstitutional therein.

10. The court erred in holding and deciding that by the stipulation and agreement as to the facts the question of whether or not

the constitution and statutes of the State of Montana authorize the City of Helena to incur an indebtedness for the purpose of acquiring a water supply, plant and system, to be owned and controlled by said city, and to acquire such plant, system and supply, is foreclosed and concluded, for the reason and because by said stipulation as to the facts it is only agreed and stipulated that the City of Helena proposes to observe and follow the provisions of the law on the subject of incurring such indebtedness and acquiring such plant, system and supply, and does not purport to agree or stipulate that the said law is valid or sufficient to authorize such acts or proceedings.

Wherefore, the said The Helena Water Works Company, appellee, prays that the decree of the said circuit court of appeals of the ninth judicial circuit be reversed.

B. PLATT CARPENTER,
STEPHEN CARPENTER, AND
M. S. GUNN,
Solicitors for Appellee, The Helena Water Works Company.

(Endorsed:) Assignment of errors, Filed Apr. 6, 1903, F. D. Monckton, clerk, U. S. circuit court of appeals for the ninth circuit.

305 Know all men by these presents, that we, the Helena Water Works Company, as principal, and the United States Fidelity and Guaranty Company, a corporation of Baltimore, Md., as surety, are held and firmly bound unto the City of Helena, Montana, in the full and just sum of five hundred dollars, to be paid to the said City of Helena; for which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed, with our seals and dated this 1st day of April, A. D. 1903.

Whereas, lately at a circuit court of appeals of the United States for the ninth circuit, in a suit depending in said court, between The City of Helena, appellant, and The Helena Water Works Company, appellee, a decree was rendered against the said The Helena Water Works Company, appellee, and the said The Helena Water Works Company having obtained from said court an order allowing an appeal to reverse the decree of said court in the aforesaid suit, and a citation directed to the said City of Helena citing and admonishing it to be and appear at a United States Supreme Court, to be holden at the city of Washington, in the District of Columbia, on the 20th day of May next:

Now, the condition of the above obligation is such, that if the said The Helena Water Works Company shall prosecute its appeal to effect, and answer all costs if it fail to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE HELENA WATER WORKS COMPANY.
By WM. A. CHISSMAN, *Manager.*
[SEAL.] THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By JOHN H. ROBERTSON, *Its Attorney in Fact.*

306 *Statement.*

The United States Fidelity and Guaranty Company.

Capital paid in cash $1,650,900.00.

Total resources over $3,500,000.00.

Home office: Corner Calvert and German streets, Baltimore, Md.

At the close of business, December 31st, 1902.

Commenced business August 1st, 1896.

Assets.

Investments, stocks and bonds (market value)	$2,245,188.59
Cash on hand and in banks	177,362.78
Collateral loans	144,935.00
Real estate	116,909.56
Loans on mortgage	54,100.00
Mortgages and other collateral a/c salvage	10,000.00
Agents' balances, less commissions, fidelity and surety	189,626.73
Agents' balances, less commissions, burglary	39,404.82
Due for subscriptions, department of guaranteed attorneys	35,533.10
Advanced a/c contracts secured	182,472.86
Interest due and accrued	24,794.51
	$3,220,327.95

Liabilities.

Capital stock paid in cash	$1,650,900.00
Cash collateral deposits	187,460.15
Bills payable	80,000.00
Surplus and reserve	1,301,967.80
	$3,220,327.95

GEORGE R. CALLIS, *Secretary.*

JOHN R. BLAND, *President.*

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 7th day of January, 1903, before me, A. D. Patrick, a notary public in and for the city and State aforesaid, appeared John R. Bland and George R. Callis, president and secretary respectively, of the United States Fidelity and Guaranty Company, who, being

by me severally duly sworn, did depose and say that they are such officers of the said company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of
307 the said company, as they appeared upon the books of the said company on the 31st day of December, A. D. 1902.

In witness whereof, I have hereunto set my hand and official seal the day and year aforesaid.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

Whereas, the United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress approved August 13, 1894, and entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts;

Now, therefore, the said United States Fidelity and Guaranty Company, is hereby granted authority to do business under said act in said State of Maryland and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

HOLMES CONRAD,
Acting Attorney General.

Department of Justice, Washington, D. C., September 25, 1896.
[DEPARTMENT SEAL.]

308 DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Sept.* 15, 1902.

The annexed is a true copy of an original authorization to do business, issued by the Attorney General, under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] CECIL CLAY,
Chief Clerk.

Form of Affidavit, Acknowledgment and Justification by Guarantee or Surety Company.

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

On this 1st day of April, one thousand nine hundred three (1903) before me personally came John H. Robertson, known to me to be

the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Helena Water Works Company, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of San Francisco, State of California, that he is the attorney in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the
309 annexed bond (form —) of Helena Water Works Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that John H. Robertson is the duly authorized agent and attorney of said The United States Fidelity and Guaranty Company, to accept service of the process in the northern judicial district of the State of California, and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of one million five hundred thousand dollars ($1,500,000.00).

JOHN H. ROBERTSON.

Sworn to, acknowledged before me, and subscribed in my presence this 1st day of April, 1903.

F. D. MONCKTON,
[SEAL.] *Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.*

(Endorsed:) Bond on appeal. Approved April 3, 1903, Wm. B. Gilbert, United States circuit judge. Filed Apr. 6, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

310 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF HELENA, Appellant,
v.
THE HELENA WATER WORKS COMPANY, Appellee. } No. 891.

Certificate of Clerk Circuit Court of Appeals to Transcript of Record.

I, Frank D. Monckton, clerk of the United States circuit court of appeals do hereby certify the foregoing three hundred and nine (309) pages, numbered from one (1) to three hundred and nine (309) inclusive, to be a true copy of the record, the opinion of the court, the assignment of errors, and of all proceedings in the above entitled case as the same appear of record in my office, and that the

same, together, constitute the transcript of record therein upon appeal to the Supreme Court of the United States.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 17th day of April, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

311 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City of Helena, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, District of Columbia, on the 20th day of May, 1903, pursuant to an order allowing an appeal filed in the office of the clerk of the United States circuit court of appeals for the ninth circuit, wherein The Helena Water Works Company is appellee and you are the appellant, to show cause, if any there be, why the decision and decree made and rendered against the said appellee, as in said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, United States circuit judge and judge of the United States circuit court of appeals for the ninth circuit, this 3d day of April, A. D. 1903.

WM. B. GILBERT,
Circuit Judge.

Service of the foregoing citation admitted and receipt of copy thereof acknowledged this 11th day of April, A. D. 1903.

EDWARD HORSKY,
TOOLE AND BACH, AND
R. LEE WORD,
Solicitors for the City of Helena.

312 [Endorsed:] D. No. 891. United States circuit court of appeals for the ninth circuit. The City of Helena *vs.* The Helena Water Works Company. Citation on appeal to Supreme Court U. S. Filed Apr. 17 1903 F. D. Monckton, clerk.

Endorsed on cover: File No. 18912. U. S. circuit court of appeals, 9th circuit. Term No. 269. The Helena Water Works Company, appellant, *vs.* The City of Helena. Filed April 30, 1903. File No. 18912.